Lord Camden.

THE

RIGHTS OF JURIES

DEFENDED.

THE

RIGHTS OF JURIES

DEFENDED.

THE

RIGHTS OF JURIES

DEFENDED.

TOGETHER WITH

AUTHORITIES OF LAW

IN SUPPORT OF THOSE RIGHTS.

AND THE

OBJECTIONS

TO

MR. FOX'S LIBEL BILL

REFUTED.

BY CHARLES EARL STANHOPE,

FELLOW OF THE ROYAL SOCIETY, AND OF THE SOCIETY OF ARTS, AND MEMBER OF THE AMERICAN PHILOSOPHICAL SOCIETY AT PHILADELPHIA.

LONDON:

PRINTED BY GEORGE STAFFORD,

FOR P. ELMSLY, IN THE STRAND.

1792.

RIGHTS OF JURIES.

A Conſtitutional Queſtion of the higheſt importance has lately been agitated both in and out of Parliament, and the moſt oppoſite Opinions have been held upon the Subject. Thoſe invaluable Rights of the People, the *Trial by Jury*, and the *Liberty of the Preſs*, have been in imminent Danger; and it has been deemed neceſſary to paſs an Act of Parliament in order to ſecure them. Although the Danger ſeems to be thereby at preſent averted, there are *other* Means by which the ſame pernicious Principles that created the Alarm, may be carried into Effect.

The Public, therefore, muſt be put upon their guard. The Chief Juſtice of the King's Bench has lately been defeated, as to his prepoſterous *Pretenſions* reſpecting the Power of *Judges*; but, who will anſwer that ſimilar Pretenſions will never be revived?

It is proper that the Country at large, and particularly that thoſe who are liable to be called upon to ſerve on Juries, ſhould be acquainted with their Rights; and when that Knowledge ſhall be univerſally diffuſed, our Liberties will be ſecure. A diſpaſſionate Inveſtigation of our Laws and Conſtitution is expedient at all Times; but, after the Attacks that have been made upon the Conduct of thoſe in Parliament, who have conſidered it as their Duty to ſupport the *Libel Bill* of Mr. Fox, it becomes peculiarly proper to give to the Public, a fair Opportunity of comparing the Arguments in Support of that Bill, with thoſe on the oppoſite Side of the Queſtion. The enlightened Part of the Nation

tion will then judge, whether the Houſe of Commons, and the Majority of the Houſe of Lords, have meritoriouſly ſtood forth in the Defence of the moſt eſſential Rights of the People, or whether they have promoted (as it has been ſaid) "*the Confuſion and* "*Deſtruction of the Law of England.*"

The Object of the Act that I have mentioned is to remove ill-founded Doubts reſpecting the Functions of Juries in Caſes of Libel; and to prevent a Practice from prevailing with reſpect to the Crime of *Libel*, which is contrary to the firſt Principles of our Criminal Law in all other Caſes. That Act of Parliament does *not alter* the Law; but it confirms it, by condemning as *illegal* a Species of Direction to a Jury that *deſerved* to be reprobated, and condemned.

It is thereby *declared* and enacted, that on every Trial for the making or publiſhing any *Libel*, the Jury may give a *General Verdict* of *Guilty* or *Not Guilty*, upon the *whole Matter*

put in Iſſue; and ſhall *not be required or directed*, by the Court or Judge, to find the Defendant or Defendants *Guilty, merely* on the Proof of the *Publication* of the Paper charged to be a Libel, and of the *Senſe* aſcribed to the ſame in the Indictment or Information.

It will ſcarcely be believed by Poſterity, that at the End of the Eighteenth Century, a Syſtem ſhould have been attempted to be eſtabliſhed, that Juries ſhould be *directed* to find a Man *Guilty of a Crime*, for publiſhing a Paper which perhaps contains no *criminal* Matter whatſoever; and that the Queſtion of the *Criminality or Innocence* of the Perſon thus *blindly convicted* by the Jury, ſhould afterwards be decided by *Judges* appointed by the Crown: which Syſtem, if it had been eſtabliſhed, would have annihilated at one Blow the Liberty of England.

It is ſaid, "That the Criminality or In-
"nocence of *any Act done* (which includes
"any Paper written) is the Reſult of the
"Judgment

" Judgment which the Law pronounces up-
" on that Act, and muſt therefore be, in
" *all* Caſes, and under *all* Circumſtances,
" *Matter of Law*, and not Matter of
" Fact †."

By " *any Act done*," it is obvioufly meant the criminal Killing in the Caſe of Murder, the Burglary in the Caſe of Houſebreaking, the criminal Publication in the Caſe of Libel, &c. And the *Criminality* of each of theſe Acts is ſaid to be *Matter of Law*.

Now, let us conſider what is the Practice of the Judges upon this Subject. In the Caſe of Homicide, they always leave to the Jury to find, that the Priſoner is Guilty of Murder, or Guilty of Manſlaughter, or Not Guilty; but they do *not* direct the Jury to find the *Fact* of killing, and the *Circumſtances* that attended the killing, and to leave to the

† See the Anſwer of the Judges to the firſt Queſtion put to them by the Houſe of Lords.

Court to decide upon the Point of *Law*; namely, whether ſuch killing be Murder, or Manſlaughter, or juſtifiable Homicide. In like manner, in the Caſe of Houſebreaking, they leave to the Jury to find whether the Priſoner be Guilty or Not Guilty of *Burglary*; but they do *not* direct the Jury to find the *Facts*, and to leave to the Court the Deciſion of the *Matter of Law*. On the contrary, in both theſe Caſes, it is every Day's Practice, for the Judge or Court before whom the Defendant is tried, to leave to the *Jury*, not only the Deciſion upon the Matters of Fact, but alſo the Deciſion upon the *Criminality* or *Innocence* of the Defendant.

It therefore becomes neceſſary to examine, whether there be any good Reaſon for adopting a *different* Line of Conduct in the Caſe of *Libel*, from that which it is the daily Practice of the Judges to purſue in the Caſe of *Murder*. But firſt, it will be proper to take a general View of the Nature of the Proceedings upon a criminal Proſecution.

The

The very *Form of the Proceedings* upon the Trial of a Perſon charged with *any* Crime, proves that it is *not* the *Judge* who is to decide, but the *Jury*, whether ſuch Perſon be, or be not, *Guilty*. The Form of thoſe Proceedings may be found in different Books.

If the Defendant ſay, *Not Guilty*, he is then aſked, *How wilt thou be tried?* which was formerly a very ſignificant Queſtion, though it is not ſo now; becauſe anciently, trial by *Battel*, and trial by *Ordeal* were uſed, as well as by the Country, or a Jury. Therefore, it is now uſually anſwered, "*By God and the Country.*" The Jury are then called; the Proclamation is then made; the Defendant is then told he may challenge the Jury; and the Jury is then ſworn. Then they are counted (to know whether the Jury be complete); and then they are *charged* in the following words: "You good Men that are "ſworn, you ſhall underſtand, that A. B.

"now

" now Priſoner at the Bar, ſtands indicted, " for that he" [reciting the Indictment]: " to which Indictment he hath pleaded *Not* " *Guilty*, and for his Trial hath put him- " ſelf upon *God and his Country*, which " COUNTRY YOU ARE; ſo that *Your* " *Charge* is, to inquire whether he be *Guil-* " *ty* of the" [Crime] " *whereof he ſtands* " *indicted*, or *not* Guilty."

Of what Crime, therefore, is the Jury *charged* to inquire, whether the Priſoner be Guilty, or Not Guilty? Of the Crime, ſays the CHARGE, *whereof he ſtands indicted*. And where are the Jury to find *that Crime* deſcribed? Of courſe in the INDICTMENT. Let us then (in order to find the accurate *Deſcription* of that Crime) examine the Form of the Indictment, which is as follows: *videlicet*, " That A. B. late of ——, in " the County of ——, on the —— day of " ——" [felonioufly, or maliciouſly, or otherwiſe, as the Caſe may be] " did" [ſtating

ing the Crime committed]. " And ſo the " Jurors aforeſaid," [namely, the Grand Jury], " upon their Oath do ſay, that the ſaid " A. B. on the aforeſaid Day, at ——, in " the County of ——, in Manner and Form " aforeſaid," [felonioufly, or malicioufly, or otherwiſe, as the Caſe may be] " did" [ſtating the Crime committed] " againſt the " Peace of our ſaid Lord the King, his " Crown and Dignity, and againſt the Form " of the Statute in ſuch Caſe made and pro- " vided."

It is therefore the *Right*, and the *Duty* of a Jury to find the Defendant *Not Guilty*, unleſs they be *convinced*; firſt, that he *committed* the Act; ſecondly, that he did it with *legal Malice*; thirdly, that the Act ſo done was " *againſt the Peace of the King*," that is to ſay, againſt the Peace of the Country; and fourthly (when it is an Offence againſt an Act of Parliament), that the Act ſo done was " *againſt the Form of the Statute in ſuch Caſe*

" *made and provided.*" But the Law implies that " *Every Offence againſt the Statute* is " *againſt the Peace,*" as Lord Hale † ſays.

In the Caſe of an Offence againſt an Act of Parliament, the Jury being expreſsly *charged* to find, whether the Act done be, or be not, done " *againſt the Form of the Statute,*" it is manifeſtly an Abſurdity to maintain, that in *that* Caſe the Jury have *no Right* to decide upon Matter of *Law*; for, nothing can be more clearly *Matter of Law*, than the *Conſtruction of an Act of Parliament*. The Abſurdity of the Propoſition, that Juries have no Right to decide upon Matters of Law, as well as upon Matters of Fact, when a *complex Queſtion* of Law and Fact is brought before them, is equally groſs in every other Inſtance; though, in ſome Inſtances, it may poſſibly be leſs ſtriking.

† See Lord Hale's Pleas of the Crown, Vol. ii. p. 188.

Suppoſe

Suppoſe a Man to be indicted for High Treaſon, upon the Statute of Queen Anne †, by which it is enacted, "That if any Perſon or Perſons ſhall, maliciouſly, adviſedly and directly, by *writing or printing*, maintain and affirm, that the Kings or Queens of this Realm, with and by the Authority of Parliament, are not able to make Laws and Statutes of ſufficient Force and Validity to limit and bind the Crown, and the Deſcent, Limitation, Inheritance, and Government thereof, every ſuch Perſon or Perſons ſhall be guilty of High Treaſon, and being thereof lawfully convicted, ſhall be adjudged Traitors, and ſhall ſuffer Pains of Death, and all Loſſes, and Forfeitures, as in Caſes of High Treaſon." And ſuppoſe that the *whole* of the Book, or of the Paper publiſhed, be put in the *Indictment*.

† VI Anne, Chap. vii. §. 1.

Now, let us examine, whether it will beſt anſwer the Ends of Juſtice, that the Criminality, or Innocence of the Perſon ſo accuſed of High Treaſon, be decided by a *Jury*, or by the *Court*.

A Priſoner has the Advantage of challenging *peremptorily*, *Twenty* Jurymen in the Caſes of Petit Treaſon and Felony, and no leſs than *Thirty-five* in the Caſe of High Treaſon; and he has alſo the Advantage of challenging *for Cauſe*, any Number of Jurymen, without limit, in *all* Caſes †. This ſhews

† *Blackſtone*, in his Commentaries, Vol. iv. p. 353, 8th Edit. after having explained the different Grounds for challenging Jurymen, ſays "*Challenges* upon any of the foregoing Accounts "are ſtiled *Challenges for Cauſe*, which may be "*without Stint* in both *criminal* and civil Trials. "But in criminal Caſes, or at leaſt in capital "ones, there is *(in favorem vitæ)* allowed to the "Priſoner an arbitrary and capricious ſpecies of "Challenge

ſhews how great an Advantage it is to any Perſon in this Country, to be tried *by a Jury* of his Equals, from which he has *excluded* all

---

" Challenge to a certain number of Jurors, " without ſhewing any Cauſe at all, which is " called a *peremptory Challenge*; a Proviſion full of " that Tenderneſs and Humanity to Priſoners, for " which our Engliſh Laws are juſtly famous. " This is grounded on two Reaſons. 1ſt. As " every one muſt be ſenſible, what ſudden Im- " preſſions and unaccountable Prejudices we are " apt to conceive, upon the bare Looks and Geſ- " tures of another; and how *neceſſary* it is, that a " Priſoner (when put to defend his Life) ſhould " have a good Opinion of *his Jury*, the want of " which might totally diſconcert him; *the Law* " wills that he ſhould *not* be tried by *any one* " *Man* againſt whom he has conceived a Preju- " dice, even without being able to *aſſign* a Reaſon " for ſuch his Diſlike. 2dly, Becauſe upon *Chal-* " *lenges for Cauſe* ſhewn, if the Reaſon aſſigned " prove inſufficient to ſet aſide the Juror; per- " haps the bare queſtioning his Indifference may " ſometimes

exceptionable Men. Whereas, were *the Judges*, or any of them, to decide upon his Innocence or Guilt, he would be tried by Men, *not one of whom* he could challenge, however *obnoxious* they might be to him; for, *Blackſtone*, in his Commentaries †, ſays, "By the Laws of England, in the Times of "*Bracton* and *Fleta*, a *Judge* might be re-"*fuſed for good Cauſe*; but, *now* the Law is "otherwiſe, and it is held that *Judges or* "*Juſtices* cannot be challenged."

Suppoſe, for example, that *Sir Elijah Impey*, who was a Judge in India, were to be made a Judge in England; and ſuppoſe that the Honourable Member of the Houſe of Commons, who moved, in that Houſe, that

---

"ſometimes provoke a Reſentment; to prevent "all ill Conſequences from which, the Priſoner "is ſtill at liberty, if he pleaſes, *peremptorily* to "ſet him aſide."

† Vol. iii. p. 361. 8th Edit.

Sir

Sir Elijah Impey be impeached for the Murder of *Nuncomar*, were to be indicted for publiſhing a Pamphlet ſuppoſed to contain *High Treaſon*; no Man could endure the Idea that that Gentleman's Condemnation or Acquittal ſhould depend upon the *Deciſion* of that very Man, whom he had (properly † or improperly, no Matter which) thus publicly accuſed.

But, to put a ſtill ſtronger Caſe. Suppoſe a Member of the Houſe of Commons were to move that Houſe to impeach *all the Judges* of the Court of King's Bench (and one of the *principal Reaſons* for which the Trial by Impeachment was eſtabliſhed, was in order to be able to puniſh Judges who might *de-*

† No reflection whatever is here intended againſt the Learned Gentleman above alluded to; inaſmuch, as it is to be preſumed that he was innocent, as the Houſe of Commons rejected the Motion for his Impeachment.

ſerve

ſerve it); and ſuppoſe that that Motion were to be adopted by that Houſe, and that thoſe Judges were to be actually tried in Weſtminſter Hall, at the Bar of the Houſe of Lords; and ſuppoſe that, from the Death of ſome material Witneſs, or other Cauſe, thoſe Judges, ſo impeached, were to be acquitted. Could it be endured, that the Fate of the Managers who had conducted the Impeachment, nay perhaps, that the Fate of the very Gentleman who had moved it in the Houſe of Commons, ſhould, upon an Indictment for a Libel, or perhaps upon an Indictment for High Treaſon, *depend* upon thoſe very Judges whom they had thus impeached, inſtead of depending upon the Deciſion of a fair, honeſt and impartial Jury?

Blackſtone, in his Commentaries†, ſpeaking of the *Trial by Jury* or *the Country*,

† Vol. iv. p. 349, 8th Edit.

ſays,

ſays, " The Antiquity and Excellence of this " Trial for the ſettling of civil Property has " before been explained at large. And it " will hold much ſtronger in *criminal Caſes*, " ſince, in Times of Difficulty and Danger, " more is to be apprehended from the " VIOLENCE AND PARTIALITY OF " JUDGES appointed by the Crown, in " Suits between the King and the Subject, " than in Diſputes between one Individual " and another, to ſettle the *Metes and Boun-* " *daries of private Property*. Our Law has " therefore wiſely placed this ſtrong and " *two-fold* Barrier, of a *Preſentment*, and " a *Trial by Jury*, between the Liberties of " the People, and the Prerogative of the " Crown. It was neceſſary for preſerving " the admirable Balance of our Conſtitution, " to veſt the Executive Power of the Laws " in the Prince: and yet this Power might " be dangerous and deſtructive to that very " Conſtitution, if exerted without Check or

" Controul, by *Juſtices of Oyer and Ter-*
" *miner* occaſionally named by the Crown;
" who might then, as in *France or Turkey*,
" impriſon, diſpatch, or exile, any Man that
" was obnoxious to the Government, by an
" inſtant Declaration, that ſuch is *their* Will
" and Pleaſure. But the Founders of the
" Engliſh Laws have, with excellent Fore-
" caſt, contrived that no Man ſhould be
" called to anſwer to the King for any capi-
" tal Crime, unleſs upon the preparatory Ac-
" cuſation of Twelve or more of his Fellow-
" Subjects, the Grand Jury; and that the
" *Truth of every Accuſation*, whether pre-
" ferred in the Shape of Indictment, In-
" formation, or Appeal, ſhould afterwards
" be confirmed by the *unanimous Suffrage*
" *of Twelve of his Equals and Neighbours*,
" indifferently choſen, and ſuperior to all
" Suſpicion. So that the Liberties of Eng-
" land cannot but ſubſiſt, ſo long as this
" *Palladium* remains ſacred and inviolate; not

" only

" only from all *open* Attacks (which none " will be ſo hardy as to make); but, alſo " from all *ſecret Machinations*, which may " ſap and undermine it."

And again † " An open Verdict may be " either *General*, Guilty, or Not Guilty; or " elſe *Special*, ſetting forth all the Circum- " ſtances of the Caſe, and praying the " Judgment of the Court, whether, for In " ſtance, on the *Facts ſtated*, it be Murder, " Manſlaughter, or no Crime at all. This " is where they doubt the Matter of Law, " and therefore *chuſe* to leave it to the De- " termination of the Court; though they " have an *unqueſtionable Right* of determining " upon all the Circumſtances, and finding a " *General Verdict*, if they think proper."

The Right which a Jury has (and which is not queſtioned) of finding a *Special Verdict*

† Vol. iv. p. 361. 8th Edit.

when they *chuſe* to leave the Determination on Matter of *Law* to the Court, is a plain Proof that the Jury are Judges of Law, as well as of Fact. For, their *leaving the Deciſion on the Law* to the Court, evidently implies, that if they pleaſe, they have that *Right of Deciſion* in themſelves.

The famous *Bracton*, who wrote above five hundred Years ago, ſpeaking of Caſes of Life, Limb, Crime, and Diſheriſon of the Heir *in capite*, ſays, "*The King* could not "decide; for, then he would have been "*both Proſecutor and Judge*; neither could "his *Juſtices*, for they *repreſent* him." If, therefore, for the Reaſons given by Bracton, neither the King nor his Juſtices can decide; of courſe, the Jury muſt.

In a Book of the firſt Authority, compiled by the famous Littleton †, in the Reign of King Edward the Fourth, in which Reign

† Section 368.

he

he was a Judge, it is ſaid, " In ſuch Caſe, " where the Inqueſt," (that is to ſay, the Jury) " may give their Verdict at large, if they " will take upon them the *Knowledge of the* " *Law* upon the Matter, they may give their " Verdict *generally*, as is put in their Charge." And the Law as thus laid down by *Littleton*, is confirmed by *Lord Coke*, in his Inſtitutes †.

If, therefore, in the Days of *Littleton*, when Knowledge was ſo much more confined than it is at preſent, Juries were deemed competent to " take upon them the " *Knowledge of the Law*," it is a groſs Inſult to the Underſtanding of Mankind, in this *enlightened* Age, to maintain that Juries are now *incompetent* to do ſo, and that it is " *their Province only to try Facts.*"

A Caſe is reported in Salkeld ††, where

† Firſt Inſtitutes, p. 228.

†† Vol. iii. p. 373.

Lord

Lord Chief Juſtice *Holt* held, that "In *all* "Caſes, and in *all* Actions, the Jury may "give a *General* or Special Verdict, as well "in Cauſes *criminal* as civil; *and the* "*Court ought to receive it*, if pertinent to the "Point in Iſſue; for, if the Jury doubt, they "*may refer* themſelves to the Court, but are "*not bound* ſo to do."

This ſame learned Chief Juſtice, in his Direction to the Jury, upon the Trial † of *John Tutchin* for a Libel, ſaid; "They" (meaning Tutchin's Counſel) "ſay, they "are innocent Papers, and *no Libels*; and "they ſay, *nothing is a Libel* but what re- "flects upon *ſome particular Perſon*." And again, "Now, *you are to conſider*, whether "theſe Words I have read to you, *do not be-* "*get* an ill Opinion of the Adminiſtration of "the Government."

† State Trials, Vol. v. p. 542. 3d Edit.

Here,

Here then, Lord Chief Juſtice *Holt* tells the Jury, in the the plaineſt Terms, that it is *they* who are "to conſider" what *Effect and Operation* the Papers in Queſtion *do* produce. He does *not* ſay to the Jury, I am not called upon *to diſcuſs the Nature of this Libel*; go and decide whether the Defendant *did publiſh it*; go and determine the *Senſe of the Paſſages* in the Paper; thoſe are the *two Points for you to attend to.* That able Chief Juſtice of the King's Bench did *not* act in a Manner ſo *illegal.*

In the famous Caſe of the *Seven Biſhops*, who were tried in the Reign of King James the Second, for publiſhing a Libel, for having preſented a Petition to the King; the four Judges of the Court of King's Bench widely differed in Opinion as to the Criminality of the Biſhops, and *every one of them* delivered his Opinion thereon to the Jury †,

† State Trials, Vol iv. p. 394, and following, 3d Edit.

and

and expreſsly left to them the Deciſion of the *Matter of Law*, under *all* the Circumſtances of the Caſe. Lord Chief Juſtice *Wright*, at the End of his Direction to the Jury, ſaid, " I muſt, in ſhort, give you my " Opinion; *I do take it to be a Libel.* Now, " this being a *Point of Law*, if my Bro- " thers have any thing to ſay to it, I ſuppoſe " they will deliver their Opinions."

Mr. Juſtice *Holloway* then addreſſed the Jury as follows. " Look you, Gentlemen, " it is not uſual for any Perſon to ſay any " Thing after the Chief Juſtice has ſummed " up the Evidence; it is not according to the " Courſe of the Court. But this is a Caſe " of an extraordinary Nature, and there be- " ing a *Point of Law* in it, it is very fit " every Body ſhould deliver their own Opi- " nion. The Queſtion is, whether this Pe- " tition of my Lords the Biſhops be a *Libel*, " or no. Gentlemen, the *End and Intention* of " every Action *is to be conſidered*; and like-

" wiſe

" wiſe in this Caſe, we are to conſider the " *Nature of the Offence* that theſe Perſons are " charged with. It was for delivering a " Petition, which, according as they have " made their Defence, was with all Humi- " lity and Decency that could be; ſo that, " if there was *no ill Intent*, to deliver a Peti- " tion cannot be a Fault; it being the Right " of a Subject to petition. *If you are ſa- " tisfied there was an ill Intention of Sedition, " or the like, you ought to find them guilty:* " but, if there be nothing in the Caſe that " you find, but only that they did deliver a " Petition to ſave themſelves harmleſs, and " to free themſelves from Blame, by ſhew- " ing the Reaſon of their Diſobedience to the " King's Command, which they apprehend- " ed to be a Grievance to them, and which " they could not in Conſcience give Obedi- " ence to; *I cannot think it is a Libel.* It is " left to *you*, Gentlemen; but that is my " Opinion."

Mr. Juſtice *Powell* then delivered his Opinion. " Truly," (ſays he) " I cannot ſee, " for my Part, *any thing of Sedition*, or any " *other Crime*, fixed upon theſe Reverend Fa- " thers my Lords the Biſhops.

" For, Gentlemen, to make it a *Libel*, it " muſt be *falſe*†, it muſt be *malicious*, and " it muſt *tend to Sedition*. As to the *Falſe-* " *hood*, I ſee nothing that is offered by the " King's Counſel, nor any Thing as to the " *Malice*. It was preſented with all the " Humility and Decency that became the " King's Subjects to approach their Prince " with. Now Gentlemen, the Matter is " before you; you are to conſider of it, and " it is worth your Conſideration."

Mr. Juſtice *Allybone* ſaid, " The ſingle " Queſtion that falls to my Share is, to give

† The Seven Biſhops had been charged with publiſhing " a *falſe*, feigned, *malicious*, pernici- " ous, and *ſeditious* Libel."

" my

" my Senſe of this Petition; whether it ſhall " be *in Conſtruction of Law*, a Libel in itſelf, " or a Thing of great Innocence."

He then ſpoke to the Point, and gave his Opinion, that it *was* " *a Libel.*"

It is well known what violent Attacks were made upon the Conſtitution, by the Judges, in the Reign of that Tyrant King James the Second: I quote this famous Caſe therefore, only to ſhew, that *even thoſe Judges* did not venture to go the Length of *denying to Juries* the Right of deciding upon the *Guilt or Innocence* of Perſons accuſed. And it was pointedly ſaid by Earl Camden, " What would the Judges of King " James the Second have given for this " Doctrine? It would have ſerved as an ad- " mirable Footſtool for Tyranny."

The Right of Juries to give a General Verdict upon the whole Matter in Iſſue is evident from this Circumſtance; that ſuch Verdict, ſo given, cannot be ſet aſide by the

Court, under Pretence that it is *contrary to Evidence*, or *contrary to the Directions* of the Court or Judge, if it be a *Verdict of Acquittal*.

This Principle is recognized by various Deciſions; and amongſt others, in the Caſes of the *King againſt Davis and others*, and of the *King againſt Bear*. The firſt of theſe Caſes is reported in Shower †; it was "an "Information for an Aſſault and Riot, tried "at the Devonſhire Aſſizes, and a Verdict "was found for the Defendants that they "were *Not Guilty*. Serjeant Tremayne moved "for a *New Trial*, upon Affidavits of the "Fact, and that the *Judge's Directions* were "to find the Aſſault: the Motion for a New "Trial was oppoſed, becauſe it was in a "*Criminal* Proceeding, and no Corruption "or *Practice* ſhewed; and a *New Trial was* "*denied*; for, that the Court ſaid, there could

† Vol. I. p. 336.

"be

" be *no Precedent* ſhewn for it *in Caſe of* " *Acquittal.*"

The Caſe of the *King againſt Bear* is reported in Salkeld†; it was " an Indict- " ment for a Libel, and the Defendant was, " by a Verdict, acquitted. Mr. Attorney " General moved for a *New Trial*, but it " was *denied:* and the Court ſaid, that an- " ciently it was *never* done in *Criminal Caſes*, " where Defendants have been *acquitted;* " latterly, where it has been a Verdict obtain- " ed by Fraud or *Practice*, as ſtealing away " Witneſſes, &c. it has been done; but *never* " *yet was done* merely upon the Reaſon that " the *Verdict was againſt Evidence.*"

Theſe Caſes clearly ſhew, that the Authority of the Jury is *ſuperior* to that of the Court, in the Caſe of *Acquittal.*

In the State Trials †† there is a curious

† Vol. II. p. 646. 3d Edit.

†† State Trials, Vol. II. p. 76. 3d Edit.

Account

Account of the Trial of the famous Lieutenant-colonel John Lilburne for High Treaſon, in the Reign of King Charles the Second. He addreſſed the Judges thus; "You Judges "that ſit there are no more, if the Jury "pleaſe, but *Cyphers* to pronounce the Sen-"tence, or their Clerks to ſay *Amen* to them; "being, at beſt, in your Origin, but the "*Norman Conquaror's Intruders.*" (Lilburne meaning, no Doubt, thereby, that the Judges were Intruders when they intruded on the legal *Province of the Jury.*) He alſo addreſſed the Jury thus: "My honeſt Jury, "and Fellow Citizens, who I declare, by "the Law of England, are the *Conſervators* "and *ſole Judges* of my Life, having inhe-"rent in them *alone* the judicial Power of "the *Law* as well as *Fact.*"

The Jury acquitted *Lilburne*; and they were afterwards arbitrarily examined before the Council of State, concerning their Verdict.

dict †. In general their Reply was, "*That* "*they had discharged their Consciences*" in their Verdict; and most of them would give *no other Answer*; and a more sensible Answer they certainly could not give. But James Stephens, one of the Jurymen, went further, and said, that "The Jury *having weighed all* "*which was said*, and conceiving themselves "(notwithstanding what was said by the "Counsel and Bench to the contrary) *to be* "*Judges of Law*, as well as of *Fact*, they "had found him *Not Guilty*." Michael Rayner, another Juryman, answered nearly to the same Effect. And Gilbert Gayne, another of the Jury, said, "That the Jury did "find as they did, because they took themselves to be *Judges of the Law* as well as "of the *Fact*; and that although the Court "did declare, they were mere Judges of the "*Fact only*, yet the *Jury* were *otherwise* per-

† State Trials, Vol. II. p. 81, 82. 3d. Edit.

suaded

" ſuaded from what they learnt out of the " Law-Books."

This was the manly Conduct of an honeſt and high-ſpirited *Jury*, who diſcharged their Duty, by acquitting a Man whom they deemed to be innocent.

Another Proof of the Rights of Juries is, that a Jury *cannot be puniſhed* by the Court for their Verdict. It has been well ſaid, that that Queſtion ſhould be looked upon as dead and buried ſince the famous Caſe of *Buſhell*, which is reported by Lord Chief Juſtice *Vaughan*. Buſhell was one of the Jury in the Caſe of the *King againſt Penn and Meade*, and had been committed for finding the Defendants *Not Guilty*, againſt Law, againſt Evidence, and *againſt the Direction of the Court in Matter of Law*; and being brought before the Court of Common Pleas by *Habeas Corpus*, this Cauſe of Commitment appeared upon the Face of the Return to the Writ.

It was upon that Occaſion, that that diſtinguiſhed Chief Juſtice, reciting the following Words

words in the return, viz. "*That the Jury ac-*
"*quitted thoſe indicted againſt the Direction of*
"*the Court in Matter of Law, openly given*
"*and declared to them in Court,*" expreſſed himſelf thus †: "The Words, *That the Jury*
"*did acquit, againſt the Direction of the Court,*
"*in Matter of Law,* literally taken, and *de*
"*plano,* are inſignificant, and not intelligi-
"ble; for, no Iſſue can be joined of Matter
"in Law, no Jury can be charged with the
"Trial of Matter in Law barely, no Evi-
"dence ever was, or can be given to a Jury
"of what is Law, or not; nor no ſuch
"Oath can be given to, or taken by, a Jury,
"to try Matter in Law; nor no Attaint can
"lie for ſuch a falſe Oath.

"Therefore we muſt take off this *Vail*
"*and Colour of Words,* which make a Shew of
"being *ſomething,* and in Truth are *nothing.*

"If the Meaning of theſe Words, *finding*

† Vaughan's Reports, p. 143.

" *againſt the Direction of the Court in Mat-*
" *ter of Law*, be, that if the *Judge* having
" heard the Evidence given in Court (for,
" *he* knows no other), ſhall tell the *Jury*,
" upon this Evidence, the *Law* is for the
" Plaintiff, or for the Defendant, and you
" are under the Pain of *Fine and Impriſon-*
" *ment* to find *accordingly*, then the Jury
" ought of *Duty* ſo to do; *every Man ſees*
" that the *Jury* is but a troubleſome Delay,
" great Charge, and of no Uſe in determining
" Right and Wrong, and therefore the Trials
" by them may be better aboliſhed than con-
" tinued; which were a *ſtrange new-found*
" *Concluſion*, after a Trial ſo celebrated for
" many hundreds of Years."

" But if the *Jury*" (ſays this learned and able Chief Juſtice †) " be not obliged,
" in *all* Trials, to follow ſuch Directions, if
" given; but, only in *ſome* ſort of Trials (as

† Vaughan's Reports, p. 144.

" for

" for inſtance, in Trials for *Criminal Matters*
" upon Indictments or Appeals); why then
" the Conſequence will be, though not in *all*,
" yet in *Criminal Trials*, the *Jury* (as of no
" material Uſe) ought to be either omitted
" or aboliſhed, which were the *greater Miſ-*
" *chief to the People*, than to aboliſh them in
" *Civil Trials.*"

And again †, " Always, in diſcreet and
" lawful aſſiſtance of the Jury, the Judge's
" Direction is *hypothetical*, and upon Sup-
" poſition, and *not poſitive and upon Coercion.*"

This able Judge, in the ſame Caſe, gives us the Reaſons *why* a Jury ought *not* to be *fined and impriſoned*, for *finding againſt the Direction of the Court in Matter of Law*; and his Arguments are unanſwerable.

" I would know" (ſays he ††) " whether
" any thing be *more common*, than for two

† Page 144.

†† Pages 141 and 142.

" Men, Students, Barriſters, or Judges, to
" deduce contrary and *oppoſite Concluſions* out
" of the ſame *Caſe in Law?* And is there
" any Difference that *two* Men ſhould infer
" diſtinct Concluſions from the ſame Teſ-
" timony? Is any thing more known than
" that the ſame Author, and Place in that
" Author, is forcibly urged to maintain con-
" trary Concluſions, and the Deciſion hard,
" which is in the Right? Is any thing more
" frequent in the Controverſies of Religion,
" than to preſs the ſame Text for oppoſite
" Tenets? How then comes it to paſs that
" two Perſons may not apprehend, with Rea-
" ſon and Honeſty, what a Witneſs, or many,
" ſay, to prove in the underſtanding of one,
" plainly one Thing; but in the Apprehenſion
" of the other, clearly the contrary Thing?
" Muſt, therefore, *one* of theſe *merit Fine*
" *and Impriſonment*, becauſe he doth that
" which he cannot *otherwiſe* do, preſerving

" his

" his *Oath and Integrity?* And this often is
" the Caſe of the *Judge* and *Jury.*"

What this learned Chief Juſtice ſays in the ſame Caſe, reſpecting the *Direction of the Judge*, is excellent. " No Caſe" (ſays † he) " can be invented; wherein it can be main-
" tained, that a *Jury* can find, *in Matter of*
" *Law, nakedly, againſt the Direction of the*
" *Judge.*"

" Sure this latter Age" (ſays he ††) " did
" not firſt diſcover, that the Verdicts of
" Juries were many Times not according to
" the Judges Opinion and Liking.

" But the Reaſons are, I conceive, moſt
" clear, That the Judge could not, nor can
" *fine and impriſon* the Jury in ſuch Caſes.

" Without a *Fact* agreed, it is as *impoſſible*
" for a Judge, or any other, to know the *Law*
" relating to *that Fact*, or direct concerning
" it, as to know an Accident that hath no
" Subject.

---

† Page 145. †† Pages 146 and 147.

" Hence,

" Hence it follows, That the Judge can " *never direct what the Law is* in any Matter " controverted, without *firſt* knowing the " *Fact*; and then it follows, That without " his *previous* knowledge of the *Fact*, the " Jury cannot go againſt his Direction *in* " *Law*; for, he *could not direct*.

" But the Judge, *quà* Judge, cannot know " the Fact poſſibly, *but from the Evidence* " *which the Jury have*; but (as will appear) " he can *never* know *what* Evidence the " *Jury* have, and conſequently he cannot " know the Matter of *Fact*, nor puniſh the " Jury for going againſt *Their Evidence*, " when he *cannot know* what *Their Evidence* " is.

" It is true, if the Jury were to have *no* " *other* Evidence for the Fact, but what is " depoſed in Court, the Judge might know " *Their* Evidence, and the Fact from it, " equally as they, and ſo direct what the " Law were in the Caſe; though even then

" the

" the Judge and Jury might *honeſtly differ* in " the Reſult from the Evidence, as well " as two Judges may, which often hap- " pens."

" But the Evidence which the *Jury* have " of the Fact, is much other than that; for, " they may have Evidence from their *own* " *perſonal Knowledge* †, by which they

† Even when a Fact is *admitted* by a Defendant, it is *Evidence* of the Fact, but not *concluſive* Evidence; as for inſtance, ſuppoſe a Defendant, charged with having *publiſhed* a Libel, were, by miſtake, to *admit* that he had *ſold one Copy* of it to *one of the Jurymen*; it *might* ſo happen that the Book ſo ſold might be *another* Book with the *ſame* Title, or *another* Number or Volume of the *ſame* Work. The Juryman would therefore *know*, that the *Fact admitted* was *not true*. Therefore, in the Eye of the *Law*, NO FACT (even though admitted) can be conſidered *as proved*, until the *Jury have found it*; either by a *Special Verdict* that ſtates it, or by a *General Verdict* that implies it.

" may

" may be aſſured, and ſometimes are, that " what is depoſed in Court, is abſolutely " *falſe*; but to this the *Judge* is a Stranger, " and *he* knows no more of the Fact than " he hath learned in Court, and perhaps by " *falſe* Depoſitions, and conſequently *knows* " *Nothing*.

" The *Jury* may know the Witneſſes to " be ſtigmatized and infamous, which may " be *unknown* to the Parties, and conſe- " quently to the *Court*."

" A Man" (ſays he †) " cannot ſee by " another's Eye, nor hear by another's Ear; " no more can a Man *conclude or infer* the " Thing to be reſolved, by *another's Under-* " *ſtanding or Reaſoning*. And though the " Verdict be right the *Jury* give; yet they, " being not aſſured it is ſo from their *own* " *Underſtanding*, are forſworn, at leaſt *in foro* " *conſcientiæ*."

† Page 148.

This

This celebrated Chief Juſtice further ſays †, " That *Decantatum*" (or *ſaying*) " in our " Books, *Ad quæſtionem facti non reſpondent* " *Judices, ad quæſtionem legis non reſpondent* " *Juratores*, literally taken, is true: for, if " it be demanded, What is the *Fact?* the " Judge cannot anſwer it. If it be aſked, " What is the *Law* in the Caſe? the Jury " cannot anſwer it. Therefore, the Parties " agree the Fact by their pleading upon *De-* " *murrer*, and aſk the Judgment of the *Court* " for the Law. In *Special Verdicts*, the " *Jury* inform the *naked Fact*, and the *Court* " deliver the Law.

" But" (ſays he ††) " upon all *General* " *Iſſues*, the Jury find *not* (as in a *Special* " *Verdict*) the *Fact* of every Caſe by itſelf, " leaving the *Law* to the *Court*; but find " for the Plaintiff or Defendant upon the

† Vaughan's Reports, p. 149.

†† Page 150.

" *Iſſue* to be tried, wherein they reſolve *both*
" *Law and Fact complicately*, and not the
" Fact by itſelf; ſo as though they anſwer
" not ſingly to the Queſtion what is the
" Law, yet *they determine the Law in all*
" *Matters*, where Iſſue is joined, and tried
" in the principal Caſe, but where the Ver-
" dict is *Special*."

The whole Court of *Common Pleas* concurred with Lord Chief Juſtice *Vaughan*, in this Opinion; and *Buſhell* was diſcharged.

I have now fully proved, that a Jury is *not puniſhable by the Court* for their Verdict, however much the Court may be diſſatisfied therewith. And although there be a Proceſs, called a Writ of *Attaint*, by which a Jury may be tried for their Verdict in *civil* Caſes, by a Grand Jury of Twenty-four; yet, a Jury is not liable to an *Attaint* at the Suit of the King.

In the Caſe of the Dean of St. Aſaph, his Counſel

Counſel Mr. *Erſkine*, in Michaelmas Term 1784, moved the Court of King's Bench for a *new Trial*; and on that Occaſion (referring to what was ſaid reſpecting an *Attaint*, by Lord Chief Juſtice Vaughan in Buſhell's Caſe) ſaid †, "There is *no Caſe* in all the "Law *of an Attaint for the King*, nor any "Opinion but that of Thyrning's, 10th of "Henry the Fourth, title Attaint, 60 and "64, for which there is *no Warrant in* "*Law.*"

Lord Mansfield concurred in this Opinion, and ſaid ††, "*To be ſure it is ſo.*"

So, here we have the Chief Juſtice of the King's Bench, expreſsly confirming the Law reſpecting *Attaint*, as laid down by Vaughan, that illuſtrious Chief Juſtice of the Common Pleas.

---

† See Mr. Erſkine's Argument in Support of the Rights of Juries, p. 138.

†† Page 138.

Lord Camden has maintained, that "the "Judge is to give his *Advice* to the Jury "*both* as to *Law and Fact*." To which it has been anſwered, that Lord Hale lays it down, that the Judge is to give his *Advice* to the Jury only as to the *Fact*, but that the Jury muſt receive the *Direction* of the Judge in *Matter of Law*. Whereas, Lord Hale, on the contrary, has uſed the Word *Direction, indifferently* as applied, either to Matter of *Fact* †, or to Matter of *Law* ††.

But even the very Paſſage in Lord Hale, where he ſays that a Judge "*is able to di-* "*rect*" a Jury in *Matters of Law*, makes againſt the Opinion of thoſe who deny to a

† In Lord Hale's Hiſtory of the Common Law, p. 260. (3d Edit.), he ſpeaks of the "Advan- "tage of the Judge's Obſervation, Attention "and Aſſiſtance, in Point of *Fact*, by way of "*Direction* to the Jury."

†† See p. 257 of the ſame Book.

Jury

Jury the Rights which I am contending for; for, Lord Hale, in his Hiſtory of the Common Law, Page 257, ſays, "Another Excellency of this Trial" (namely, the Trial by Jury) "is this; that the Judge is *always* "*preſent* at the Time of the Evidence given "in it: herein he *is able*, in *Matters of Law* "emerging upon the Evidence, *to direct* them; "and alſo, in *Matters of Fact*, to give them "a great Light and *Aſſiſtance* by his weighing the Evidence before them, and obſerving "where the Queſtion and Knot of the Buſineſs lies, and by ſhewing them HIS OPINION, *even in Matter of Fact*, which "is a great Advantage and Light to Laymen: and thus, *as the Jury aſſiſts* † *the* "*Judge*

† "*As the Jury aſſiſts the Judge in determining* the "*Matter of Fact.*" Theſe Words of Lord Hale may not be immediately underſtood, inaſmuch as the Judge *never does determine* "*Matter of* "*Fact*"

" *Judge* in determining the *Matter of Fact*;
" *ſo the Judge* ASSISTS *the Jury* IN *deter-*
" *mining* Points of *Law.*"

Lord Hale does *not* ſay here, that the Judge *is to direct*, but that he *is able to direct* the Jury. Neither does he ſay, that the Judge ASSISTS the Jury, BY *determining*, but IN *determining* Points of *Law*: that is to ſay, that the *Judge* is to ASSIST the Jury; but that after all, the Jury them-

---

" *Fact.*" But, as the Judge may give his Opinion, even as to *Matter of Fact*, the Jury *may* greatly *aſſiſt the Judge* in forming his *Opinion* reſpecting the Fact, by putting occaſional Queſtions to the Witneſſes, *previouſly* to his ſumming up the Evidence. A Juryman, for Inſtance, who is a Merchant, a Chymiſt, or a Mechanician, may aſk Queſtions, in certain Caſes, pertinent to the Matter in Iſſue, which Queſtions might not occur either to the Judge or to the Counſel.

ſelves

ſelves are the Perſons who are to DETERMINE the *Law* as well as the *Fact*. The Judge therefore acts only as an *Aſſeſſor* to the Jury. And a further Proof of this is, that Lord Hale ſays, "Another Excellency "of this Trial is this, that the *Judge* is *always* "*preſent* at the Time of the Evidence given "in it."

Now, this Expreſſionof Lord Hale would be an Abſurdity, *if* the *Judge* really were what the Enemies of Mr. Fox's Libel Bill would have us *ſuppoſe* him to be; namely, a Perſon who is to *decide* upon Matters of *Law* emerging out of the Evidence, ſo as therein to *control* the Judgment of the Jury: for then, the Preſence of the Judge would be a Thing, at all Events, abſolutely *neceſſary and indiſpenſable*; and would not be, as Lord Hale well ſtates it, merely a Thing *advantageous*, and (to uſe his own Words) an *Excellency* of this Mode of Trial. And in fact, if the Conſtitution had intended that the *Judge* ſhould *rule the Verdict*

Verdict in Matters of *Law*, the Judge would *not* be (as he now is) *prohibited* from being even *preſent* with the Jury, when they go together to agree upon their Verdict. So that, in every Point of View, it is quite clear, that the Judge is an *Aſſeſſor* to the Jury, and that he is nothing more.

The learned Commentator † on the Laws of England underſtands Lord Hale in the ſame Senſe as I underſtand him, when he ſays; "The Practice heretofore in Uſe, "of fining, impriſoning, or otherwiſe pu-"niſhing Jurors, merely at the Diſcretion "of the Court, for finding their Verdict "contrary to the Direction of the Judge, was "*arbitrary, unconſtitutional,* and *illegal*; and "is treated as ſuch by *Sir Thomas Smith*, "two hundred Years ago; who accounted "ſuch Doings to be very *violent, tyrannical,*

† Blackſtone's Commentaries, Vol. IV. p. 361. 8th Edition.

"and

" and contrary to the Liberty and Cuſtom " of the Realm of England: for, as *Sir* " *Matthew Hale* well obſerves, it would be " a moſt unhappy Caſe for the *Judge him-* " *ſelf*, if the Priſoner's Fate depended upon " his Directions: unhappy alſo for the *Pri-* " *ſoner*; for, if the Judge's *Opinion* muſt " rule the Verdict, the Trial by Jury would " be uſeleſs."

The Authority of Judge Forſter has alſo been quoted by the Oppoſers of Mr. Fox's Libel Bill, to prove that Juries are not to decide upon *Matter of Law*. " The Con- " ſtruction," (ſays Judge Forſter) " which " the Law putteth *upon Facts, ſtated and* " *agreed, or found by a Jury*, is in all Caſes " undoubtedly the proper Province of the " *Court*." But, by " *Facts ſtated and agreed,* " *or found by a Jury*," Forſter evidently means the Caſe of a *Special Verdict*; in- aſmuch as there are no ſpecific *Facts found* in a *General Verdict*, which is ſimply

 Guilty,

Guilty, or elſe *Not Guilty*. And whoever doubted, but that, in the caſe of a *Special Verdict* (that is to ſay, in the Caſe where a Jury *chuſe* to leave to the Court the Deciſion of the *Law)*, it is the *proper Province of the Court* to decide upon it?

In the Year 1777, an Information was filed *ex officio* by his Majeſty's then Attorney General (now Lord Thurlow), againſt Mr. *Horne* (now Mr. Horne Tooke) for publiſhing an Advertiſement reſpecting a Subſcription " to be applied to the Relief of " the Widows, Orphans, and aged Parents of " our beloved American Fellow-ſubjects, " who, faithful to the Character of Engliſh- " men, preferring Death to Slavery, were, for " that Reaſon only, inhumanly murdered by " the King's Troops, at or near Lexington, in " North America;" which Advertiſement was ſigned " *John Horne;*" and the *whole* of this Advertiſement was inſerted in the Information. Mr. Horne was tried before the Earl

Earl of Mansfield, who, in his Direction to the Jury, expreſſed himſelf as follows:

"Gentlemen of the Jury, There are *two* "*Points* for you to ſatisfy yourſelves in, in "order to the forming of your Verdict.

"Firſt, Did he compoſe and publiſh; "that is, was he the Author and Publiſher "of it upon this Occaſion? That is entirely "out of the Caſe, for it is admitted. "Why then, there remains nothing more, "but that which the reading of the Paper "muſt *enable you to form a Judgment upon*, "ſuperior to all the Arguments in the World. "And that is; Is the Senſe of this Paper "that Arraignment of the Government, and "the Employment of the Troops upon the "Occaſion of what happened at Lexington, "mentioned in that Paper? When you read "that, *you will form the Concluſion yourſelves.* "What is it? Why it is this; That our "beloved American Fellow-ſubjects (there-"fore ſuppoſing them innocent Men) were

" in Rebellion againſt the State. They are
" our Fellow-ſubjects; but not ſo abſolutely
" beloved without Exception; beloved to
" many Purpoſes, beloved to be reclaimed;
" beloved to be forgiven; *beloved to have good*
" *done to them*; but, not beloved ſo as to be
" abetted in the Rebellion; and therefore,
" that Paper certainly conveys an Idea that
" they are innocent. But further it ſays,
" That they were inhumanly murdered at
" Lexington by the King's Troops, merely
" upon Account of their acting like Engliſh-
" men, and preferring Liberty to Slavery."
And again, " It ſets forth, that they are
" totally innocent; that they only deſire not
" to be Slaves; they are diſpoſed to be Sub-
" jects, but deſire only not to be Slaves. Is
" that the Uſe that is made of the King's
" Troops upon this Occaſion? For, you
" will carry your Mind back to the Time
" when the Paper was wrote; was it to
" reduce them to Slavery? And, if it was
" intended

" intended to convey that Meaning, there " can be little Doubt whether it is an " Arraignment of the Government, and of " the Troops employed by them; *but that* " *is a Matter for your Judgment.* You will " judge of the Meaning of it; you will judge " of the Object to which it is applied, and " connect them together; and, *if* it is a " CRIMINAL Arraignment of the Troops, " acting under the Orders of the Officers " employed by the Government of this " Country, to charge them with murdering " innocent Subjects, becauſe they would not " be Slaves, *you muſt find your Verdict one* " *Way*; but, *if you are of Opinion*, that the " Conteſt is to reduce innocent Subjects to " Slavery, and that they were all murdered, " like the Caſes of undoubted Murders of " Glenco, and many other Maſſacres, *then* " *you may form a different Concluſion* †."

† See this Trial, taken *verbatim* in Short Hand by Mr. Blanchard.

In

In this Inſtance, Lord Mansfield left completely to the Jury to decide upon the *Criminality or Innocence* of the Act done. No Judge could have given to a Jury a more *conſtitutional Direction*, than Lord Mansfield did in this Caſe of the *King againſt Horne*.

When the Earl of Mansfield preſided in the Court of King's Bench, that Court acted in a Manner equally worthy of Notice, in the Caſe of the *King againſt Hart*. The Caſe was this:

Miſs Mary Jerom, of Nottingham, had been educated a Quaker, but having abſented herſelf from the Quakers Meetings, and having, in other Reſpects, diſpleaſed the Quakers, that Society at laſt expelled her; and *Francis Hart* (as Clerk of the Meeting) ſigned the Inſtrument of Expulſion. It recites, "That ſhe had been educated in the "Society, and that ſhe had imbibed erroneous "Notions contrary to Scripture Doctrine, "and, in divers Parts of her Conduct, ſhe had

"acted

"acted very inconſiſtently with a *Life of* "*Self-denial*," &c. (which was rather a *ſevere* Obſervation upon a *young* Lady)!

She preferred a Bill of Indictment for a Libel, againſt the Defendant *Hart*. The Cauſe was tried before Mr. Juſtice *Clive*, at the Summer Aſſizes at Nottingham, on the 30th of July 1762.

The Caſe is reported by Burn, in his Eccleſiaſtical Law †, and it is there ſtated, "That the Defendant's Counſel called no "Witneſſes, and that he was *reſtrained* from "arguing, that the Paper in Queſtion *was no* "*Libel*, by the Judge, who ſaid, that *ſuch a* "*Queſtion was more proper to be determined by* "*the Court above*. The Jury found the De-"fendant *Hart* Guilty. In the Michaelmas "Term following, Mr. *Cuſt* moved the "Court of King's Bench, for a new Trial.

† Vol. II. Page 188, under the Article "*Diſ-*"*ſenters*."

"The

" The Court was clearly of Opinion, that the " Jury *ſhould have been directed to acquit* † " *the Defendant*; and they ordered the Ver- " dict to be *ſet aſide*, and a new Trial to be " had." So that the Verdict was ſet aſide, as *illegal*, becauſe the Judge *had not permitted* Hart's Counſel to argue before the Jury *the point of Law*; namely, whether the Paper in

† The Judges had probably forgot this Caſe of the *King againſt Hart*, when they gave in their Anſwer to the third Queſtion put to them by the Houſe of Lords, wherein they ſay, " We anſwer, " that upon the Trial of an Indictment for a " Libel, the Publication being clearly proved, " and the Innocence of the Paper being as clear- " ly manifeſt, *it is competent* and legal for the " Judge to direct *or recommend* to the Jury to give " a Verdict for the Defendant. But, we add, " that *no Caſe has occurred* in which it would have " been, in ſound Diſcretion, *fit for a Judge*, ſit- " ting at *Niſi Prius*, to have given *ſuch a Direction* " or Recommendation to a Jury."

Queſtion

Queſtion was, or was not, a *Libel*; and becauſe the Judge, inſtead of directing the Jury to *acquit* the Defendant, had ſaid, that the Queſtion, of Libel, or no Libel, "*was more* "*proper to be determined by the Court above.*"

Here then, is Lord Mansfield, and the whole Court of King's Bench, decidedly againſt the Opinion of thoſe who hold, that "*the Province of the Jury is* ONLY *to try* "FACTS." Whether the Earl of Mansfield has always been *conſiſtent* in his Opinions upon this Subject, I ſhall leave to others to enquire.

In the Caſe of the *King againſt the Dean of St. Aſaph* (which was an Indictment for a Libel), Mr. Erſkine, on behalf of the Dean, moved the Court of King's Bench for a new Trial. The preſent Chief Juſtice of Cheſter, Mr. Bearcroft, although he was Counſel for the Proſecution, did, upon that Occaſion, explicitly admit the *Right* of the Jury to judge of the *whole* Charge. Lord *Mans-*

field interrupted Mr. *Bearcroft*, by ſaying, that he *ſuppoſed* he meant the *Power*, and *not* the *Right*. Whereupon Mr. *Bearcroft*, to his immortal Honour, inſtantly diſavowed that Explanation, and ſaid, "I did *not* mean "merely to acknowledge that the Jury have "the *Power*; for, their Power nobody ever "doubted; and if a *Judge* was to tell them "they had it *not*, they would only have to "laugh at him, and convince him of his "*Error*, by finding a *General Verdict*, which "*muſt* be recorded: I meant therefore to "conſider it as a RIGHT, as an important "Privilege, and of great Value to the Con-"ſtitution †." Such was the Declaration of a Lawyer, who is one of the moſt learned,

† This Circumſtance is thus related, in Mr. Erſkine's Argument in ſupport of the Rights of Juries, Pages 124 and 125; which Argument is printed at the End of the Trial of John Stockdale for a Libel.

moſt

moſt experienced, and diſtinguiſhed Men that ever adorned his Profeſſion.

The Judges, in anſwer to the ſixth Queſtion put to them by the Houſe of Lords, ſay, "We have given *no Opinion* to your Lordſhips which will have the Effect of taking "*Matter of Law* out of a *General* Iſſue, or "out of a *General Verdict*." And again, they ſay, "*And we diſclaim the Folly* of endeavouring to prove, that a Jury, who can "find a General Verdict, cannot take upon "themſelves to deal with *Matter of Law* "ariſing in a General Iſſue, and to hazard a "Verdict made up of the Fact, and of the "*Matter of Law*, according to *their Conception of the Law*, againſt *all Direction* by "the Judge."

Here the Judges unanimouſly diſclaim, in the moſt explicit Manner, the *Folly* of contending, that Juries cannot decide Matters of Law, againſt all Direction by the Judge.

But, in their Anſwer to the ſeventh Queſtion put to them by the Houſe of Lords, they ſay, "That it is the *Duty* of the Jury, if "they will find a General Verdict upon the "whole Matter in Iſſue, *to compound that* "*Verdict* of the *Fact* as it appears in Evi-"dence before them, *and of the Law as it* "*is declared to them by the Judge.*"

But ſo far is it from being true, that, by the Law of England, it is the "*Duty* of the "Jury to compound their Verdict of the "*Fact* as it appears in Evidence before "them, and of the *Law* as it is *declared* to "them by the *Judge*;" that, at the Time when it was the Cuſtom to fine Juries in certain Caſes, Juries have been actually *fined*, *for agreeing to bring in their Verdict in blind Compliance with the Opinion of the Court in Point of Law*, as well as *for agreeing to caſt Lots* for their Verdict, as clearly appears from the following Caſes.

In

In the Caſe of Foſter againſt Hawden, in the King's Bench, reported in Levinz †, "The Jury, not agreeing, *caſt Lots* for their "Verdict, and gave it according to Lot; "for which, upon the Motion of *Levinz*, "the Verdict was ſet aſide, and the Jury "was ordered to attend next Term to be "fined."

In an Appeal of Murder, reported in Croke ††. The Fact, that is to ſay, the Killing, was *not denied* by the Defendant, but he reſted his Defence upon a *Point of Law*, namely, that the Deceaſed had provoked him, by mocking him, and he therefore contended that it was *not* Murder. All the Court ſeverally delivered their Opinions, that it *was* Murder. The Jury could not agree whether it was Murder, or not; but the

† Part II. p. 205, 2d Edition.

†† Croke Elizabeth, Part I. p. 779.

major

major Part of them were for finding the Defendant *Not Guilty*. They however, at laſt, came to an Agreement in this Manner, "*That they ſhould bring in and offer their* "*Verdict Not Guilty; and if the Court diſliked* "*thereof, that then they ſhould all change their* "*Verdict and find him Guilty.*" In purſuance of *this* Agreement, the Jury brought in their Verdict *Not Guilty*. The Court, diſliking the Verdict, ſent the Jury back again; who, in purſuance of the Agreement they had ſo made, returned and brought in their Verdict *Guilty*. And for this Practice; namely, for having, when they were *not* agreed amongſt themſelves upon the *Point of Law*, entered into an Agreement to bring in a Verdict, as if they were agreed, and in *blind Compliance* with the Opinion of the Court in *Matter of Law*; the Jury were all fined and impriſoned; except *two* of them who diſcovered to the Court the *Manner of their Agreement*.

The

The Time is fortunately long ſince paſt, when Juries could be fined, at the Diſcretion of the Court, for their Verdicts; but how can it be ſaid, by thoſe who pay ſuch high Reſpect to the Deciſions of Courts of Law, that the *Duty* of a Jury is to do *that*, which, when a Jury *did do*, the Court of King's Bench actually *fined them for doing?* For, in the Caſe that I have laſt mentioned, in which the Jury were fined, there was no Queſtion about the *Fact*, but only about *Matter of Law*.

The Law of England unqueſtionably is, that Juries have not only the *Power*, but alſo the *Right*, to decide according to their Conſciences. It is, moreover, the *Duty* of a Jury to *exerciſe that Right*; for, the Law expects, as Lord Chief Juſtice Vaughan has fully ſhewn, that they ſhould *not* give a *General Verdict*, in *blind Compliance* with the Opinion of the Court, or Judge, either as to Matter of *Law* or Fact, without the *Conviction* of their own Minds: for, if they feel themſelves

themſelves unequal to decide upon the *Point of Law*, the Law permits them to find the Facts, *without* deciding upon the Law; namely, by finding a *Special Verdict*. And it was admirably ſaid by Earl Camden, that, "If he were ſummoned upon a Jury to try "the Iſſue upon a Libel, no Power upon "Earth ſhould compel him to find a De- "fendant *Guilty*, unleſs he were convinced "in his own Mind, that the Paper publiſhed "*were really a Libel.*"

There was a Time however, when a Jury might have brought in a Verdict of "*Guilty*," without conſidering whether the Paper were, or were not a *Libel*; namely, during the Continuance of that ſcandalous Act of Parliament of the 13th and 14th of King Charles the Second Chap. 33, for regulating *the Preſs*.

By that Act is was enacted, that no private Perſon or Perſons, ſhall print, or cauſe to be printed, any Book or Pamphlet whatſoever,

ſoever, unleſs the ſame be *firſt* lawfully *licenſed, and authorized* to be printed, by certain Perſons appointed by the Act to licenſe the ſame.

Law Books were to be licenſed by the Lord Chancellor, or by one of the Chief Juſtices, or by the Chief Baron.

Books of Hiſtory, or Books concerning State Affairs, were to be licenſed by one of the Principal Secretaries of State.

Books concerning Heraldry were to be licenſed by the Earl-Marſhal.

And all other Books, that is to ſay, all Novels, Romances, and *Fairy Tales*, and all Books about Philoſophy, Mathematicks, Phyſic, Divinity, or *Love*, were to be licenſed by the Lord Archbiſhop of *Canterbury*, or by the Lord Biſhop of *London* for the time being: the Framers of this curious Act of Parliament, no doubt, ſuppoſing, that thoſe *Right Reverend* Prelates were, of *all* the

Men in the Kingdom, the moſt converſant with *all* thoſe Subjects.

That Act commenced in June 1662, and paſſed only for *two* Years. It was continued by an Act of the 16th of Charles the Second, and by another Act of the 17th Year of the ſame diſgraceful Reign; and in a few Months afterwards it expired. So that *the Law now is* what it would have been, in caſe that infamous Act of Parliament had *never* paſſed.

I ſuſpect that much of the *miſerable Confuſion* of Ideas, that has exiſted upon this Subject of *Libels*, has ariſen from that Act of Parliament having, for a Time, totally altered the Law upon the Subject.

It is no Doubt the Duty of a Jury, in all Caſes, to give a clear, diſtinct, and *unambiguous* Verdict. But, ſuch a Verdict, for inſtance, as "*Guilty of publiſhing only*," is an abſurd Verdict. It ſhould be conſidered as a mere *Nullity*, and as *No Verdict*. Such a Finding

Finding does not fulfil the Engagement which the Jury enter into, when they take their Oath; the Form of which Oath †; in a Criminal Caſe, is as follows: videlicet; "*You* ſhall well and truly try, and *true De-* "*liverance make*, between our Sovereign Lord "the King, and the Priſoner at the Bar, whom "*you* ſhall have in Charge, and a *true Ver-* "*dict* give according to *Your Evidence:* ſo "help you God." Neither is ſuch an *imperfect* Finding agreeable to their Charge, which directs them "to enquire whether the "Defendant be *Guilty* of the Crime *whereof* "*he ſtands indicted*, or *Not Guilty*." A Jury ought therefore, to be convinced that the Defendant is guilty of the "*Crime whereof* "*he ſtands indicted*," before they pronounce him *Guilty* under any Words of Qualifica-

† The Form of this Oath, as here given, is taken from Burn's Juſtice, Vol. IV, p. 189. 15th Edit. Article "Seſſions."

tion: for, there is no *Guilt at all* in publiſhing an innocent Paper.

In the Caſe of the *King againſt Simons*, (upon a Rule to ſhew Cauſe why a New Trial ſhould not be had) it was laid down by Mr. Juſtice *Deniſon*, as reported by *Sayer* †, that "If the Verdict had been "taken as the Jurors intended to give it, "namely, *Guilty of the Fact, but without* "*any evil Intention*," it would have been an "incomplete Verdict; and conſequently *no* "*Judgment* could have been given upon "it."

And Lord Coke, in his Inſtitutes ††, ſays, that "A Verdict finding Matter *uncertainly* "or *ambiguouſly* is inſufficient, and *no Judg-* "*ment* ſhall be given thereupon."

If a Jury therefore be convinced, that a Defendant has *only publiſhed*, and be *not* convinced that the Thing publiſhed is of the

† Page 36. †† Firſt Inſtitutes, p. 227.

cri-

criminal Nature and Deſcription ſet forth in the Indictment or Information; the Jury ought neither to bring in their Verdict "*Guilty of publiſhing*," nor "*Guilty of pub-*"*liſhing only*;" but it is their Duty to bring in an unambiguous and direct Verdict of "*Not Guilty.*"

It is alſo the Duty of a Jury, to find a *General* and *not* a *Special Verdict*, if they feel themſelves competent to decide the *Law* upon the Caſe. Their finding a *Special Verdict*, unleſs they feel themſelves unequal to determine upon the *Points of Law*, is *ſhrinking* from that Duty which, by their Oath, they undertake to perform.

The *Juries*, in the Caſes of the King againſt *Lilburne*;—of the King againſt *Penn and Meade* (where *Buſhell* was upon the Jury);--of the King againſt *Stockdale* who was proſecuted for a Libel;—of the King againſt *Owen*; and in many other Caſes, have done themſelves everlaſting Honour, by taking upon

upon themſelves to decide *Law* as well as *Fact*, according to the true Spirit of our free Conſtitution. *Owen* was a Bookſeller, and was proſecuted by Information in the Year 1752, by the then Attorney General, for a Libel: the Direction of Lord Chief Juſtice *Lee* to the Jury, does not appear at full Length in the State Trials. However, it appears, that the Chief Juſtice "*declared it* "*as his Opinion that the Jury ought to find* "*the Defendant Guilty.*" The Jury brought in their Verdict *Not Guilty*. And it appears by the State Trials †, that after the Verdict of *Not Guilty* was given, "the Jury went away; "but, at the Deſire of the Attorney General, "they were called into Court again, and "aſked this leading Queſtion, *viz. Gentle-* "*men of the Jury, do you think the Evidence* "*laid before you, of Owen's* PUBLISHING

† Vol. X. p. 208 of the Appendix.

"*the*

" *the Book by ſelling it, is not ſufficient to con-*
" *vince you, that the ſaid Owen* DID *ſell this*
" *Book?*"

" Upon which the Foreman, without an-
" ſwering the Queſtion, ſaid, *Not Guilty,*
" *Not Guilty:* and ſeveral of the Jury ſaid,
" *That is our Verdict, my Lord, and we abide*
" *by it.* Upon which the Court broke up,
" and there was a prodigious Shout in the
" Hall."

The *State Trials* have ſometimes been pleaſantly termed " *Libels* upon the *Judges.*"

A curious Argument has been uſed to prove that Juries are to *try Facts only*; videlicet, that *Verdict* comes from *veridicere*, which means, it is ſaid, " *to find Facts:*" therefore, it is logically concluded, that Juries *are only to try Facts*; as if, indeed, the *Rights of the People* were to reſt upon *Latin Etymologies!* whereas, *veridicere* does not ſignify " *to find Facts;*" but " *to ſpeak the Truth.*"

Conſequently, *Verdict* ſignifies *to ſpeak the Truth reſpecting the Matter in Iſſue.* But the *Matter in Iſſue* is *not* whether the *Act* were, or were not, committed; but whether the Defendant be *Guilty*, or *Not Guilty*. That is the *Thing in Iſſue*. The Perſons, therefore, who argue in this Manner, are miſtaken *in Fact*, as well as *in Law*.

It has been ſaid by the Enemies of Mr. Fox's Libel Bill, that "As the Law is the "Rule of *all* Men's Actions, it ſhould there-"fore be decided by the *Judges*: otherwiſe, "there will be *one Law* for *Cumberland*, and "another for *Cornwall*." It is rather ſingular, that *theſe two Counties* ſhould, as it were by mere Accident, have been named; as they lead us to draw a direct *oppoſite* Concluſion.

At the *Carliſle* Aſſizes, ſome years ago, the Judge (who was either Mr. Juſtice *Aſhurſt*, or Mr. Juſtice *Willes*) aſked a Witneſs what was the Meaning of a *Word* that the Witneſs had

had made Uſe of, and which the Judge ſaid that he did not underſtand. The Anſwer the Judge received was a loud *Burſt of Laughter* from all the People in the Court-Houſe; and yet the Judge had ſaid nothing that was ridiculous, for he only aſked the Explanation of a *Word* uſed in *Cumberland*, but which was not uſed in many other Parts of England. The People of Cumberland, however, who *all* underſtood this *Word* perfectly, thought this ſo extraordinary a Queſtion, that they immediately burſt out a-laughing in the Judge's Face.

It ſo happens, that this *very Word* is uſed by the People in the County of *Cornwall*, in a Senſe totally *different*.

Now, let us ſuppoſe a Paper to be publiſhed in *Cornwall* with this *Word* in it; and another Paper, Word for Word the *ſame*, to be publiſhed by another Perſon in the County of *Cumberland*, ſome time after.

If by Law, the Jury were *bound* † to find a Defendant *Guilty*, upon the mere Proof of the *Publication* of the Paper charged to be a Libel, and to leave to the Court to decide upon the Criminality or Innocence of the Defendant (according to this Idea of *Uniformity*), this is what would happen, *if* there were *no Innuendoes* in the Indictment or In-

† At the Trial of the Dean of St. Aſaph, at the Shrewſbury Aſſizes, in Auguſt 1784, Mr. Juſtice Buller, in his Directions to the Jury, ſaid, "The Matter appears upon the *Record*, "and as ſuch it is not for me, a ſingle Judge, "ſitting here at *Niſi Prius*, to ſay, whether "it is, or is not, a *Libel*." And again, "There "is no Contradiction as to the *Publication*, and "*if* you are ſatisfied of this in Point of *Fact*, "it is my Duty to tell you, that in Point of *Law* "you are *bound* to find the Defendant *Guilty*."

See the Trial, as taken in Short Hand by William Blanchard, p. 26, 27, and 28.

formation;

formation: the Man who publiſhed *firſt*; namely, he who publiſhed the Paper in *Cornwall*, might in reality be guilty of a groſs *Libel*; and being *guilty*, would be puniſhed as ſuch, and the Judgment recorded. Whereas, the other Man, who publiſhed a *ſimilar* Paper afterwards in *Cumberland*, with this very *ſame Word* in it, might be perfectly *innocent*; inaſmuch, as this *ſame Word* has in *Cumberland*, a totally *different Meaning*. Yet the Judges, finding the former Judgment upon Record, would conſider themſelves bound to follow the Precedent before them. Conſequently, the latter Defendant (though in fact innocent) would be found *Guilty!* So much for this Syſtem of *Uniformity*.

Whereas, if theſe *two* Perſons, who publiſhed theſe Papers, in thoſe two Counties reſpectively, were to be tried, as I contend that by the Law of England they muſt be

tried, that is to ſay, by *Juries* in thoſe reſpective Counties; the guilty Man, namely, he who *had* publiſhed a Libel in *Cornwall*, would, by a Corniſh Jury, be found *guilty*; and the innocent Man, namely, he who had publiſhed the ſame Paper in *Cumberland*, but who had *not* publiſhed a Libel, would, by a Cumberland Jury, be (as in juſtice he *ought* to be) *acquitted*. For, thoſe two Juries would interpret thoſe Papers, in thoſe different Counties, according to their true Senſe and *Meaning* † in each reſpectively.

† In the Caſe of the *King againſt Horne*, on a Motion *in Arreſt of Judgment*, Lord Mansfield ſaid, "It is the Duty of the Jury to conſtrue plain "Words, and clear Alluſions to Matters of uni-"verſal Notoriety, according to their *obvious* "*Meaning*, and as every Body elſe who reads "muſt underſtand them." See Cooper's Reports, p. 680.

The

The Judges, in anſwer to the fifth Queſtion put to them by the Houſe of Lords, ſay, "The *Senſe* of a threatening Letter, or *of* "*any other Words reduced to Writing*, is no-"thing more than the *Meaning* which the "Words do, according to the *common* Accep-"tation of Words, import, and which every "Reader will put upon them. *Judges* are, "in this Reſpect, but *Readers*."

And again, "*Judges* have no Means of "knowing Matters of Fact *dehors*" (that is, *out of*) "the Paper, but by the *Confeſſion* "*of the Party*, or the *Finding of the Jury*: "But they can collect the intrinſic Senſe "and Meaning of a Paper, in the ſame "Manner as *other* Readers do; and they "can reſort to *Grammars and Gloſſaries*, if "they want ſuch Aſſiſtance."

I highly approve of theſe very pointed Words of the Judges; for, it is perfectly true, that as to diſcovering the *Senſe* of any

Words reduced to Writing, "*Judges are "but Readers.*" Conſequently, the *Jury* can read the Words, and can underſtand the *Senſe* as well as they can; and perhaps frequently *much better*, as in the Caſe of the two Counties I have juſt inſtanced. In ſuch Caſes, "*Grammars and Gloſſaries*" would be uſeleſs.

When a Libel is obſcurely written, there are often *Innuendoes* inſerted in the Indictment or Information; as, for inſtance, in the Caſe of the *King againſt Stockdale*, "*Mr.* "*Haſtings*" was mentioned in Mr. Stockdale's Publication. Now, in order to ſhew *who* was meant, it was in the Information, explained, by ſaying, "*Mr. Haſtings (meaning thereby Warren Haſtings Eſq. late Governor General of Bengal).*" An *Innuendo* therefore is, in fact, nothing more than an *Averment of the Meaning* of any particular Expreſſion. Now, it is *admitted*, that it is *invariably* left to the Jury to decide, whether the

the *Senſe* † affixed to the different Paſſages, by the *Innuendoes*, be, or be not, fairly affixed

† See the Direction given to the Jury by Lord Chief Juſtice *Kenyon*, in the Caſe of the *King againſt Stockdale*; and alſo the Direction of Mr. Juſtice *Buller*, in the Caſe of the *King againſt the Dean of St. Aſaph.*

It is true, that the Judges, in their Anſwer to the fifth Queſtion put to them by the Houſe of Lords, reſpecting the Caſe of a threatening Letter, ſay; "If they" (the Judges) "could "reſort to a Jury to *interpret* for them in the "firſt Inſtance, who ſhall *interpret the Interpreta-* "*tion*, which, like the threatening Letter, will "be *but* Words upon a Paper?" But, theſe Words of the Judges *obviouſly* cannot apply to the caſe of a *General Verdict*; inaſmuch as in that Caſe, the Words "*Guilty*," or "*Not Guilty*," want *no Interpretation.* Whereas, in the Caſe of a *Special Verdict*, the Jury, when they find the *Facts*, muſt find whether the *Senſe* of the Paper be the

ed to them. So that, in Caſes of *great Difficulty*, the Judges leave to the Jury the finding of the Senſe; but, where there are *no Innuendoes*, and conſequently *no Difficulty*, Juries are deemed, by thoſe who would reſtrict their Rights, to be totally *incompetent* to decide, whether the Publication be, or be not, a *Libel!* Every One muſt be ſtruck with the palpable Abſurdity of this Doctrine.

---

the *ſame* as that put upon it by the *Innuendoes*; which *Interpretation* (it is true) is "*but Words* "upon a Paper." It is therefore *probable*, that the Judges meant to point out *a new Objection* to a Jury finding *a Special Verdict*, in the Caſe of a *threatening* Letter, in the Caſe of a *Libel*, or in any *other ſimilar* Caſe, if the Jury feel themſelves competent to decide the Law; inaſmuch as (according to the above-mentioned Notion) a *Special* Verdict, when there are *Innuendoes*, requires an *Interpretation* of the *Interpretation*, which a *General* Verdict obviouſly does not.

Let

In conſidering this important Queſtion, it is proper to recollect what Sort of Judges we have had in this Country, in former Times.

In the unfortunate Reign of King Charles the Firſt, the Judges were aſked by the King, whether he could, by Law, levy *Ship-Money* without Conſent of Parliament, in *Caſes of Neceſſity*. To which the Judges anſwered, that in *Caſes of Neceſſity* he could; and they very complaiſantly added, "*And of that* "*Neceſſity your Majeſty is the ſole Judge.*"

In the Reign of King Charles II. *Scroggs*, that infamous Chief Juſtice of the King's Bench, and all the other Judges, declared under their Hands, "*That to print or publiſh any* "*News book, or Pamphlets of News whatſoever,* "*is illegal*; that it is a manifeſt Intent to the "Breach of the Peace, and they may be pro-"ceeded againſt by Law for an *illegal Thing*†."

† See Chief Juſtice *Scroggs*'s Direction to the Jury, at the Trial of Henry Carr for a Libel; in

At the Trial of the Seven Biſhops, in the Reign of King James the Second, that Wretch Mr. Juſtice *Allybone* aſſerted, that the Law reſpecting *Libels* was as follows: "I "think" (ſays he) "in the *firſt* Place, that "no Man can take upon him to write againſt "the actual *Exerciſe* of the Government, "*unleſs he have Leave from the Government*, "but he makes a Libel, be what he writes "true or falſe; for, if once we come to im- "peach the Government by way of Argu- "ment, it is the Argument that makes *it* "the Government, or not the Government: "ſo that, I lay it down that in the *firſt* Place, "that the Government ought not to be im- "peached *by Argument*, nor the Exerciſe of

---

the State Trials, Vol. III. That Trial was in the Year 1680, and was therefore, ſeveral Years *after* the unconſtitutional Act of Parliament for regulating the Preſs had *expired*.

" the Government ſhaken *by Argument*; be-
" cauſe I can manage a Propoſition in itſelf
" doubtful, with a better Pen than another
" Man: this, ſay I, is a *Libel*. Then I lay
" down this for my *next* Poſition, that *no*
" *private Man* can take upon him *to write*
" *concerning the Government at all* †."

In the Reign of King James the Second, the Judges were of Opinion, that the King might *ſuſpend* and *diſpenſe with* Laws, by virtue of his Regal Authority; that Money might be levied for the Uſe of the Crown, without Grant of *Parliament*; that Subjects might be *proſecuted* for petitioning the King; that a *Standing Army* might be kept up in Time of Peace, without Conſent of Parliament; that it was lawful to *diſarm* the People; that it was not illegal to require exceſſive Bail, nor to impoſe exceſſive Fines, nor

† State Trials, Vol. IV.

to inflict cruel and unuſual *Puniſhments*; and (what would be almoſt beyond Belief, if it were not recorded in the Bill of Rights †), that "*Grants and Promiſes of Fines and Forfeitures*" might legally be made "*before any Conviction or Judgment againſt the Perſons, upon whom the ſame were to be levied!*" Would it not then be intolerable to leave to *Judges* appointed by the Crown, to decide the Fate of Perſons who are accuſed?

But we are told that there is a *Remedy*; namely, *a Writ of Error, to the Houſe of Lords.*

Can it be ſeriouſly meant, to throw upon that Houſe ſuch an odious Taſk, as that of deciding the Fate of every unfortunate Criminal in this Kingdom? This would extend to all Caſes of Felony, and of High Treaſon. And I have already given an Inſtance, in

† Act 1ſt William and Mary, Seſ. 2. Chap. 2.

which

which a Perſon may be indicted for High Treaſon for a Publication. Beſides, how could it be poſſible to bring ſuch a *multiplicity* of Trials to a Concluſion in the Houſe of Lords, when the ſingle Trial of Mr. Haſtings ſtill remains unfiniſhed, after having been depending for ſo *many Years*.

But to this Remedy by *Writ of Error*, there is another inſuperable Objection. For, according to the Syſtem of thoſe who oppoſed Mr. Fox's Bill, if there be *no Innuendoes*, and if the *Fact of Publication* be either admitted or proved, the Defendant ought, *at all Events* (ſay they) to be found *Guilty*. It is alſo maintained, that the *Matter of Law* may afterwards be diſcuſſed "in the Court "from which the Record at *Niſi Prius* was "ſent, in Courts of Error, and before the "Houſe of Lords in the *dernier* Reſort †."

† See the Anſwer of the Judges to the third Queſtion put to them by the Houſe of Lords.

Now

Now, all this Time (perhaps for Years), the Defendant is to *remain in Cuſtody* †, whilſt the *Queſtion of Law* is to be thus notably decided; although, in the End, it may turn out that there is no *Criminal* Matter whatever in the Paper publiſhed; and although the *Jury* were *perfectly convinced of it*, at the time of the Trial!

However groſs this Abſurdity may appear, there is a ſtill more ſtriking Objection to

† If a Priſoner be *innocent*, he ought to be *acquitted* upon his Trial; and upon Acquittal, *immediately diſcharged*; for, by the Act of the 14th George III. Chap. 20, §. 1, it is "Enacted, that "every Priſoner who now is, or hereafter ſhall "be, charged with any Felony or *other* Crime, "or as an Acceſſary thereto, before any Court "holding criminal Juriſdiction, who, on his or "her Trial, ſhall be *acquitted*, ſhall be *immediately* "*ſet at large* in open Court."

this

this Remedy by *Writ of Error*; for, if a Defendant were to be condemned by the Court, to ſtand in the *Pillory* for a Libel, and were thereupon to bring his *Writ of Error* to reverſe the Judgment; he would nevertheleſs (according to the decided Opinion of ſome of the ableſt Lawyers in this Kingdom) be to ſtand in the *Pillory*, *before* the Matter could be brought to a Hearing upon his *Writ of Error*; for, the *Writ of Error* is no *Superſedeas*, or *Stop*, to the *Sentence* of the Court. So that, an *innocent* Man is *firſt* to ſuffer, and *afterwards* to be found *Not Guilty!* So much then, for this *admirable* Remedy by *Writ of Error!*

But we are told that the Defendant has another, and a prior Remedy, namely, by *demurring* to the Indictment. "This is in-"cident to criminal Caſes, as well as civil, "when the *Fact*, as alledged, is allowed to be "true, but the Priſoner joins Iſſue upon

"ſome

" ſome *Point of Law* in the Indictment, by " which he inſiſts that the Fact, as ſtated, " is no Felony, Treaſon, or whatever the " Crime is alledged to be. Thus, for In- " ſtance, if a Man be indicted for *feloniouſly* " ſtealing a Greyhound, which it is not Fe- " lony to ſteal: in this Caſe the Party in- " dicted may *demur* to the Indictment; de- " nying it to be Felony, though he *confeſſes* " *the Act of taking it* †."

A Defendant, therefore, in order to be permitted to try the *Point of Law* upon *Demurrer*, in this Caſe, muſt, although he never ſtole the Greyhound, begin by *confeſſing himſelf a Thief.*

In like Manner, a Man indicted for publiſhing a Paper charged to be a *Libel*, but which Paper was *no Libel*, could not try that

† Blackſtone's Commentaries, Vol. IV. Pages 333 and 334. 8th Edition.

Point

Point of *Law*, without firſt admitting the *Fact* of Publication. But it *might* be, that he had good Reaſons for *not admitting* that he *was* the Publiſher. He would conſequently, be *deprived* of trying the *Point of Law* upon *Demurrer*.

But it has been ſaid by thoſe who ought to have *known better*, that if a Man *demurs* to an Indictment, and the Law is thereupon adjudged to be againſt him, *final Judgment* will *not* be given againſt him; but that he may ſtill be tried by a Jury, and that his having *admitted the Fact* upon *Demurrer* will not preclude the Jury from acquitting him, as the Court will not record the Confeſſion. Whereas, it is ſaid by Hawkins, in his Pleas of the Crown, † "That in cri-"minal Caſes, *not capital*" (as for Inſtance, in the Caſe of *Libel*) "if the Defendant "*demur* to an Indictment, &c. the Court

† Vol. II. p. 471. 6th Edit.

will not give Judgment against him to answer over, but *final* Judgment."

This then, is the *incomparable* Remedy, by *Demurrer*, which we are told the Defendant has!

The humane Spirit of the Law of England has given to every Defendant, who is accused before a Grand Jury, THREE GUARDS to protect him against an *unjuſt* Judgment; independently of a *Demurrer*, and of the *Writ of Error*.

Firſt, the *Grand Jury*, who may throw out the Bill.

Secondly, the *Petit Jury* who may *acquit* the *Defendant*, either when the Proof as to Matter of *Fact* is inſufficient, or when they deem the *Law* to be for the Defendant.

Thirdly, the *Court*, who may grant the Defendant a *New Trial*, or who may *arreſt the Judgment*.

A *New Trial* may be granted by the Court, in the Caſe of *Conviction*; for, if the Court think

think that Juſtice has *not* been done to the Defendant, it is proper there ſhould be a *Jury of Reviſion.* But if a *New Trial* were granted in the Caſe of *Acquittal*, under Pretence that the Court *differed in Opinion* from the Jury; this moſt intolerable Abſurdity might follow; videlicet, that the Defendant *might* be finally found *Guilty* (and in a capital Caſe, even loſe his Life), although no leſs than Twelve Men, namely the *firſt* Jury, had upon their Oaths, *unanimouſly* pronounced him *Innocent*; which would be contrary to the firſt Principles of the Law of England.

But if the *Second* Jury ſhould alſo *acquit* the Defendant, then, upon the ſame Principles, the *Court* might grant a *third*; or even a *fourth* Trial. So that, at this Rate, as Lord Camden judiciouſly obſerved, "*A* "*Defendant could never be finally acquit-*"*ted.*"

"Whenever the Defendant," ſays Blackſtone †, "appears in Perſon, upon either "a capital or inferior Conviction, he may "at this Period, as well as at his Arraign-"ment, offer any Exceptions to the In-"dictment, *in Arreſt or Stay of Judgment*; "as for want of *ſufficient Certainty*, in ſet-"ting forth either the Perſon, the Time, the "Place, or the Offence. And if the Ob-"jections be *valid*, the whole Proceedings "ſhall be *ſet aſide*; but the Party may be "*indicted again*." So that upon a Motion *in Arreſt of Judgment*, the *Court* may decide on the *Regularity of the Proceedings*, and *whether there appears* A CRIME ſet forth in the Indictment or Information, and whether the ſame be *ſufficiently charged*. For, if there be NO CRIME *ſufficiently charged* in the Record, the Defendant ought *not* to have

† Blackſtone's Commentaries, Vol. IV. Chap. 29th. p. 375; 8th Edit.

Judg-

Judgment pronounced againſt him thereupon. It is therefore highly proper that the Court ſhould have *this Right*, as it is for the *Advantage* of the Defendant.

A Defendant is by Law entitled to *all the ſeveral Securities* above mentioned, and muſt therefore be deprived of *none* of them. Whereas, in *all Caſes* where the Criminality or Innocence of a Defendant may happen to turn upon *Matter of Law*; thoſe Perſons who hold that the Fate of the Defendant, muſt depend upon the *Deciſion of the Court*, would, in Fact, *deprive* him of *One* of his THREE GUARDS, and *that* his BEST; namely, his Right of being tried by his *Peers*, which is the Glory of the Engliſh Law; of that "*moſt tranſcendent Privilege*" (as Blackſtone † admirably terms it) "which "any Subject can enjoy, or wiſh for, that

† Blackſtone's Commentaries, Vol. III. Chap. xxiii. p. 379. 8th Edit.

"he

" he cannot be affected either in his Proper-
" ty, his Liberty, or his Perſon, but by the
" *unanimous Conſent* of twelve of his Neigh-
" bours and Equals. A Conſtitution, that
" I may venture" (ſays he) " to affirm, has,
" under Providence, ſecured the juſt Liber-
" ties of this Nation for a long Succeſſion of
" Ages."

But, it may be ſaid, that a Defendant has not thoſe *three Guards*, in every Caſe; for, that when he is proſecuted by *Information*, there is *no Grand Jury*; to which I anſwer, that for that very Reaſon, it is the more eſſential to uphold the Authority of the Jury that remains.

We ſhould alſo remember, that it is *not* neceſſary for the *Judges* in a Court of Law to be *unanimous*; but that a *Jury* muſt. *This* is, perhaps, one of the moſt excellent Parts of that admirable Inſtitution. A great Lawyer, whom I can never think of without Veneration, nor mention without Reſpect, the late

late Lord *Aſhburton*, made an Obſervation upon the Law requiring *Unanimity* in Juries, which was the Reſult of great Wiſdom, Experience, and Attention. He ſaid, that he had frequently obſerved from the Countenances of a Jury, that the major Part of them were carried away by a ſudden Impulſe, as it were, from ſomething that was ſaid by the Witneſſes or Counſel; and that *ſometimes* that Impreſſion was a *wrong* One. But, that he had obſerved one or more ſenſible Men upon the Jury (as it was likely there ſhould be out of ſuch a Number) who were *not* carried away by ſuch wrong Impreſſion; and that afterwards a *right* Verdict was brought in: which proved, that, as the *Majority* of the Jury *could not* bring in a Verdict without the Concurrence of the reſt, the more *ſenſible* Men had by Argument brought over the others to their Opinion. *This*, therefore, was the *good Effect*, that reſulted

ſulted from the *Unanimity* which the Law requires.

This Obſervation is of the more value, as it came from a Man of the firſt Eminence in his Profeſſion, of uncommon Acuteneſs, Depth of Thought, and Knowledge of Mankind.

Lord Hale, in his admirable Book of *the Hiſtory of the Common Law* †, ſpeaking of the ſundry Advantages of the *Trial by Jury* which he ſets forth in detail, ſays, "It has "the *unanimous* Suffrage and Opinion of "Twelve Men, which carries in itſelf a "much greater Weight and Preponderation "*to diſcover the Truth* of a Fact, than any "*other* Trial whatſoever."

Thoſe who contend, that "*the Province* "*of the Jury is* ONLY *to try* FACTS," are nevertheleſs obliged to admit, that a Jury *may* give a *General Verdict* of Guilty, or

† Page 260. 3d Edit.

Not

Not Guilty, upon the *whole Matter* put in Iſſue, "if they *pleaſe* to do it."—If it be meant thereby, that the Jury *may* do it legally; that is ſaying, in other Words, that the Jury have the *Right* to do ſo. But, if it be meant that they *cannot* do it without acting *illegally*; then, why are they never puniſhed for ſo acting? It is becauſe, by Law, they *cannot* be puniſhed for ſo doing. The Court cannot puniſh them, neither by Fine, nor *Impriſonment:* Buſhell's Caſe has completely ſettled that Point; and it has now been at reſt for above an Hundred Years. They cannot be puniſhed by *Attaint* for acquitting a Defendant *contrary to the* Directions of the Court or Judge. For, Lord Chief Juſtice *Vaughan*, and the Earl of *Mansfield*, have both declared, that *an Attaint for the King* is contrary to Law.

There have been numerous Inſtances of Juries *acquitting* Defendants, directly *contrary* to the Opinion and Directions of the

Court, or Judge. Yet, no Court can touch a *Hair of the Head* of any *one* of them.

But perhaps we may be told, that, although the Jury *would act illegally*, by acquitting a Defendant contrary to the Directions of the Judge, yet that, by Law, he *cannot puniſh* them. Surely, no Man will ſo *libel* the Law of England, as to tell us, that a Jury has a *legal* Right to do *wrong*, a *legal* Right to act *illegally*, and to *uſurp* the lawful Authority of Judges *with impunity*. The *Common Law* of England is *not* a Law of *Folly*; but a Law of *Wiſdom*. It has been ſo conſidered by Lord *Coke*, Lord *Hale*, and by the ableſt Men in all Ages. Now, it is a well-known *Maxim* of the Law of England, that there is "No Wrong without a Re-"medy:" and conſequently, that there can be no *Uſurpation* without *Puniſhment*. Therefore, as there is *no* legal Puniſhment for a *Jury* in the Caſe that I have juſt mentioned, it is a Proof that there is *no* Uſurpation, when

when a Jury take upon themſelves to decide upon Matter of *Law*, as well as upon Matter of *Fact*.

There is one Authority againſt the Principle of leaving to Juries the Deciſion of *Matter of Law* upon the General Iſſue, or Plea of *Not Guilty*, which has *not* been quoted by any of the Oppoſers of Mr. Fox's Bill; I mean no leſs a Man than a *Chief Juſtice of the King's Bench*, my Lord Chief Juſtice *Jefferies*. For, upon the Trial of *Algernon Sidney*, who was tried for High Treaſon, for a ſuppoſed Conſpiracy againſt the Life of the King, and for other Acts of Treaſon; Colonel *Sidney* ſaid, "They have "proved a Paper in my Study of *Caligula* "and *Nero*; this is compaſſing the Death "of the King is it?" Lord Chief Juſtice *Jefferies* then ſaid, "*That* I ſhall tell the "*Jury*. The *Point in Law*, you are to take "from the *Court*, Gentlemen. Whether

"there be *Fact* ſufficient, *that* is *your* Duty "to conſider †."

And in the Caſe of the *King againſt Sir Samuel Barnardiſton* ††, this ſame Judge *Jefferies* ſaid to the Jury, "*The Proof of the* "*Thing itſelf* proves the *evil* Mind it was "done with. If then, Gentlemen, you be- "lieve that the Defendant Sir Samuel Bar- "nardiſton, *did write and publiſh* †††† theſe "Letters,

† See State Trials, Vol. iii. P. 805, 3d Edit.

In the firſt Year of William and Mary, an Act of Parliament paſſed for *annulling* and *making void* the Attainder of Algernon Sidney, on account of the *Judge's Miſdirection* to the Jury. Algernon Sidney was therefore, *unjuſtly* deprived of his Life by that abominable Judge.

†† State Trials, Vol. iii. p. 940, 3d Edit.

††† Let the Reader compare this Direction of Judge Jefferies with the Principle of Mr. *Fox's Libel Bill*, which is, that on every Trial for the making or publiſhing any Libel, the Jury *may* give a *General Verdict* of Guilty or Not Guilty upon

" Letters, *that* is Proof enough of the Words " *maliciouſly*, *ſeditiouſly* and *factiouſly*, laid in " the Information †."

---

upon the *whole* Matter in Iſſue; and ſhall not be required or *directed*, by the Court or Judge, to find the Defendant *Guilty*, merely on the *Proof of the Publication*, and of the *Senſe* aſcribed to the ſame in the Indictment or Information.

The Reader will do well alſo carefully to compare that *declaratory* Bill (*now* an Act of Parliament), with Lord Chief Juſtice *Kenyon's* memorable Direction to the Jury, in the Caſe of the *King againſt Stockdale*, as taken in Short Hand by Joſeph Gurney, and printed for Stockdale; pages 112 and following.

† Lord Chief Juſtice *Jefferies*, that *paſſionate*, and *execrable* Judge, cloſed that flagitious Direction to the Jury, in the following extraordinary Words; *viz.* " Theſe Men that carry Sheep's " Cloathing, pretend Zeal and Religion; but, " their *Inſides* are Wolves. They are Traitors in " their *Minds*, whatſoever *are* their outſide Pre- " tences." *State Trials*, Vol. iii. p. 943, 3d Edition.

There never was a more infamous Principle, than that here laid down by Judge *Jefferies*; namely, that "*The Proof of the Thing* "*itſelf* proves the *evil* Mind it was done "with." A Principle worthy of the Man. Apply it, for Inſtance, to the Caſe of *Homicide*. Does *the Proof of the Killing* prove the *evil* Mind it was done with? Does it prove that it was *Murder?* This Principle is equally execrable in the Caſe of *Libel*.

This violent and unjuſt Judge thus *miſdirected* thoſe Juries. But there is no wonder that *He* ſhould attempt to take from them their *Juriſdiction*. Now, what is the Argument that is urged in Juſtification of ſo Unconſtitutional an Attempt. Why, nothing more but that common-place and thread-bare Argument, that "Judges are *better Judges of* "*Law* than Juries." To this I anſwer, that a wiſer and a better Spirit pervades the Law of England. Are the Members of the *Houſe of Lords*, in general, *better Judges of*

Points

Points of Law, than the Judges? Unqueſtionably not. Yet the Law has ſaid, that the *Majority of that Houſe* (though comparatively illiterate with reſpect to *Law*) may *reverſe* every Judgment of the Judges that is regularly brought before them to be reviſed; and this, *even* when the Judges are *unanimous* upon the Subject. This Power of the Houſe of Lords is not confined to *eaſy* Queſtions (ſuch as Caſes of *Libel*), but extends to the moſt abſtruſe, and complicated Queſtions, reſpecting Tenures, Inheritance, and Title to Civil Property, and to the moſt difficult Points of *Law* that can poſſibly be imagined. Why, then, has the Conſtitution made ſuch Men, even upon *ſuch* Queſtions, *ſuperior* to the Judges? Becauſe the Conſtitution, though it values great *Learning* much, values great *Impartiality*, reſulting from *Independence*, more. Therefore, for the very *ſame* Reaſon, has the Conſtitution of England given to *Juries*, who are not (like the Judges

Judges) appointed by the Crown, that Species of legal Pre-eminence above Judges, for which I am now contending.

Beſides, Juries are not ſo illiterate as the Enemies of Mr. Fox's Bill have been pleaſed to ſuppoſe; and upon any Indictment or Information for a Miſdemeanor, either Party has, by Law, a Right to have a *Special Jury* † to try the Iſſue; as may be done in civil Caſes.

An ingenious Obſervation has been made by the preſent Chief Juſtice of the Common Pleas; namely, that *Perſons acting in the Capacity of Judges* might be *ignorant of the Law:* and he inſtanced the Lord Mayor of London and the Aldermen, who ſit as *Judges* at the Old Bailey; and his Lordſhip pointedly remarked, that according to the Principles of the Oppoſers of Mr. Fox's Bill, an *Alderman*, when acting as a *Judge*, was to be

† Act 3. George II. Chap. 25. §. 15.

deemed

deemed an *infallible Oracle of Law*, and was to *direct* the Jury; but that, if that *ſame* Alderman happened to be himſelf upon a *Jury*, he was then ſuppoſed to become immediately *incompetent to judge of any Thing but mere Matter of Fact*.

Two of the great Principles, upon which the Liberty of this Country reſts, are theſe. Firſt, that the People ſhall be bound by no Laws but thoſe of their *own making*; namely, by thoſe only which ſhall firſt have been conſented to by their Repreſentatives in Parliament: and this is the Reaſon for a *Repreſentative Conſtitution*. Secondly, that the Laws when made, ſhall, upon every General Iſſue, be *interpreted* by the *Country* alſo, *which Country* † the *Juries* are. Take away from the People, either of theſe two *fundamental*

† See the Words in the CHARGE to the *Jury*, above-ſtated.

Pillars of the Conſtitution, and from that Inſtant the Nation is *enſlaved.*

We ought to be the more anxious to preſerve that incomparable Right of the People *the Trial by Jury*, when we conſider its Excellence, when compared with any other Species of Trial that has ever been eſtabliſhed in any Country. Compare it, for Inſtance, with the Mode of Trial in our *Eccleſiaſtical* Courts, or in our Courts of *Equity*, and the Contraſt will be ſtriking.

In the Trial by Jury, the Examination of Witneſſes is in *Open Court.* In the Courts of *Equity*, and in the *Eccleſiaſtical Courts*, the Examination of Witneſſes is *in private.* In the Trial by Jury, the Witneſſes are not only examined, but *croſs examined*, in order that the Truth may be brought out; and, in Caſes of Contrariety of Evidence, the adverſe Witneſſes are frequently *confronted.* Whereas, in the Courts where the Proceedings of the Civil Law are adopted, the Witneſſes are exa-

mined

mined upon *formal Interrogatories in writing*, which, as Lord Hale † well ſays, "preclude "*occaſional* Interrogations; and the beſt "Method of ſearching and ſifting out the "Truth is choaked and ſuppreſſed."

The Expence of a Trial by Jury is greater than it ought to be, or than it need be, if *ſpecial pleading* were reformed; which Reform would be an Object of the greateſt Conſequence, particularly to the poorer Part of the Community. But, that Expence, ſuch as it is, is nothing when compared to the Expence of a Suit in Chancery. I have heard of one Inſtance of a Diſpute about Tithes, that was brought into the *Court of Chancery* to be ſettled; it was not a Queſtion reſpecting the Tithe of Corn, Grain, and all other Produce of the Eſtate, but reſpecting

† Lord Hale's Hiſtory of the Common Law, p. 255, 3d Edition.

the *Tithe* of a *Part* only of that Produce; namely, *the Tithe of Hay:* and what now would any one ſuppoſe, upon a moderate Computation, was the *Expence* to the Parties, of deciding that narrow Queſtion? It was (as I am informed) *only twice the Value of the Fee Simple of the Whole Eſtate!* So much for the Economy of a Chancery Suit.

Now, let us compare a Trial by Jury, with a Suit in a Court of Equity, with reſpect to the *Delay*. A Trial by Jury is, as every body well knows, decided in *One Day*. Are Suits in Chancery concluded in *Days?* No, nor in *Months* either. Suits in Chancery often laſt (as the Trial of Mr. Haſtings upon Impeachment, has laſted) for *Years;* and they ſometimes laſt from Generation to Generation. My Family had a Suit depending in the Court of Chancery in Ireland, which (conſidering that it was a *Chancery Suit*) was tolerably *ſoon* ended; for, it laſted *only* about *two and forty* Years.

All

All the Parties died before it was ended: in fact, it never did come to a Concluſion by any Order or Decree of the *Court*; for, though it had continued for upwards of *forty* Years, it ended at laſt by a *Compromiſe*. This is what is emphatically termed *Chancery Diſpatch*.

This reminds me of a humorous Expreſſion of a Relation of mine, the late Earl of Cheſterfield, who happened to be in Company with a Gentleman who mentioned that he had lately bought a Spaniſh Horſe, which was ſo unruly that he overleaped every Fence about his Grounds; and the Gentlemen ſaid, in joke, that he believed he ſhould be obliged to build a Wall round the Horſe to keep him within Bounds; but that, for the preſent, he had ordered his Groom to put him in his *Court*. "I ſhould adviſe you to "do better," ſays Lord Cheſterfield; "put "him into the *Court of Chancery*, and I will "warrant you he will never *get out*."

Lord Hale, in his Hiſtory of the *Common Law*

Law of England †, ſpeaking of the *Trial by Jury*, ſays; "And as this Method is more "*certain*, ſo it is much more *expeditious* and "*cheap*; for, oftentimes the Seſſion of *one* "Commiſſion for the Examination of Wit-"neſſes for *one* Cauſe in the *Eccleſiaſtical* "Courts, or Courts of *Equity*, laſts as long "as a whole Seſſion of *Niſi Prius*, where a "*hundred* Cauſes are examined and tried."

Having explained *ſome* of the Advantages of this incomparable Mode of Trial, I will now ſhew, that there is *no Difference* between a Trial for a Libel, and a Trial for any *other* Crime, that can juſtify a Judge in directing a Jury to find a Defendant *Guilty* merely on the *Proof of the Publication*, and of the *Senſe* aſcribed, in the Indictment or Information, to the Paper publiſhed. The pretended Ground for the Diſtinction is, that, in the Caſe of a Libel, "*the Whole Matter appears* "*upon the Record*;" and that therefore, the

† Page 260, 3d Edition.

Court

Court can declare the *Law* upon the Matter ſo appearing.

Now, it often happens that *a Part only* of a Book or Paper publiſhed is inſerted, *as the Libel*, in the Indictment or Information. And it is admitted, that in *this* Caſe the *Part omitted* may, when taken together with the *Part inſerted*, totally *alter the Meaning* thereof. As, for Inſtance, if a Libel were inſerted in a Pamphlet, which Pamphlet was written for the expreſs Purpoſe of *reprobating* that Libel; it is obvious, that if that libellous Paſſage only were inſerted in an Indictment, that the *Court* could *not* ſee upon the *Face of the Record*, what was the *Meaning* of the *Pamphlet* from which it was taken; and conſequently, could *not judge* from the bare *Record*, whether the Author of the Pamphlet be, or be not, criminal. Therefore, to ſay that in this Caſe, "*the whole Matter appears upon the Record*," is palpably abſurd. I take for granted, therefore,

fore, that when it is ſaid, that in the Caſe of a *Libel*, the *whole Matter appears upon the Record*, it is meant, that it ſo appears, *when the Whole of the Paper publiſhed* is in the Indictment or Information; and that when the *Whole Matter ſo appears upon the Record*, then the Court can declare the *Law* upon the Matter ſo appearing. If this be what is meant; then it would follow, that it would depend upon the *Special Pleader* who draws the Indictment or Information (or even upon his Clerk) to decide, *whether* the Matter of *Law* ſhould be determined by the *Court*, or by the *Jury*; namely, by putting in ſuch Indictment or Information, the *Whole* or a *Part* only, of the Paper publiſhed: which is, I think, as prepoſterous an Idea as any I ever heard!

But I will demonſtrate, that in the Caſe of a *Libel*, it may often happen, even where the *Whole of the Paper publiſhed* IS *upon the Record*; yet, that the *Whole Matter is* NOT

upon

upon the Record. I will ſuppoſe an *Hand-bill* to have been diſtributed in the Streets of London, by the Defendant; and that that Fact is *not* denied by him. I will even ſuppoſe that the Defendant brings *no Witneſſes* at his Trial; but, that he reſts his Defence entirely upon the Caſe as made out by thoſe who conduct the *Proſecution.* And let me ſuppoſe that the *Hand-bill* ſo ſet forth in the Indictment or Information, be worded as follows, *videlicet:*

"TO THE ENEMIES OF POPERY.

"Now is the Time for you to do Juſtice "to yourſelves, by taking up arms; and by "fighting, like brave Men, the Enemies of "the Proteſtant Cauſe."

(Signed)

"A TRUE PROTESTANT."

This would appear upon the *Face of the Record,* to be a moſt *ſeditious* Paper; inaſ-

much, as it calls upon a certain Deſcription of the People, namely, upon the "*Enemies* "*of Popery*," to *take up Arms*; and *that*, not for any legal Purpoſe (ſuch, for Inſtance, as ſupporting the Civil Power); but for the Purpoſe of "*fighting the Enemies of the Pro-* "*teſtant Cauſe.*"

The obvious Meaning, therefore, of ſuch an Hand-bill would appear to be, that Proteſtants were invited to deſtroy Roman Catholics; which is no Doubt as wicked, and as infamous a Thing as can well be imagined. That is to ſay, it is a Solicitation to commit ſuch ſcandalous and atrocious Acts as were commited in the Year 1780, when the Chapels of the Roman Catholics were deſtroyed; the worthy Sir George Saville's Houſe was attacked; when Lord Mansfield's Houſe was burnt down; and when London was ſet on Fire in ſeventeen Places in one Night.

This then, is the Meaning of this Hand-bill, as it appears upon the *Face of the Re-*

cord;

cords; and this would be, if poſſible, ſtill more clearly its Meaning, if it ſhould come out in Evidence at the Trial, that it had been diſtributed in London, at the *very Time* that thoſe Enormities were committed.

But, let me now ſuppoſe another Caſe; namely, that the Witneſſes called in Support of the Proſecution to prove the Publication of that Hand-bill by the Defendant, were to prove, that at the very Time when the Copies of that Hand-bill were diſtributed in London by him, it was known there, that a *Popiſh* Prince had landed in this Country, and was in the Heart of the Kingdom, at the Head of an Army, and was advancing towards the Metropolis, to overturn the Government, to wreſt the Crown from the Hanover Family, to eſtabliſh Popery, and to deſtroy the Conſtitution and Liberties of this Nation. And ſuch a Caſe, it is well known, did actually exiſt, when the Pretender was at Derby in the Year 1745.

If ſuch a Fact, for Inſtance, ſhould come out *in Evidence* upon the Trial; pray what would *then* appear to be the Meaning of this *identical Hand-bill?* Why, a Meaning quite *oppoſite* to that which, *without this parol and extrinſic Evidence*, it undoubtedly would have.

So little, then, is it true, that *the whole Matter is upon the Record*; that it is manifeſt that in the Caſe I have put, the *Criminality or Innocence* would entirely depend upon a *Fact* which is NOT upon the Record.

Now, as it is obvious, that *no juſt and deciſive Inference of Guilt*, can be drawn from what appears in the Indictment or Information; there being Circumſtances *eſſential* to the *Guilt or Innocence* which do *not* ſo appear. It conſequently follows, that in the Caſe of a *Libel*, the *Criminality or Innocence* of the Paper, ſet forth upon the Record as the Libel, is NOT (as has been moſt erroneouſly maintained) *an Inference of Law* from the Record;

Record; even in the Caſe where the *whole of ſuch Paper* IS upon the Record, and "*where* "*no Evidence is given for the Defendant,*" † at the Trial.

It

† The above Obſervation ſhews, how exceedingly *ill-conceived* the firſt Queſtion was, that was moved, by the *Chief Juſtice of the King's Bench*, to be put to the Judges; videlicet: "On the Trial "*of an Information*, or Indictment for a Libel, is "the *Criminality or Innocence*, of the Paper ſet forth "in ſuch Information or Indictment as the Libel, "Matter of *Fact*, OR Matter of *Law*, where *no* "*Evidence is given for the Defendant?*"

That Queſtion puts the Caſe of "*no Evidence* "*being given for the Defendant*;" as *if* it therefore, *neceſſarily* left the Defendant without Juſtification; totally forgetting, that the Defendant may juſtify himſelf *by Argument*, or by *croſs-examining* the Witneſſes for the Proſecution, or even by Facts that may come out upon their *Examination in chief!*

To

It is well ſaid by Lord Hale, in his Hiſtory of the Pleas of the Crown†, that "it is "the *Mind* that makes the taking of another's Goods to be a *Felony*, or a *baſe* "*Treſpaſs only*." No doubt, the *Intention* is a principal Conſideration: and what a Man's *Intention* is, when he does an Act, is a pure Matter of *Fact*, and not Matter of *Law*. As for Inſtance, a Man goes to a Horſe-dealer to buy a Horſe, but deſires firſt to try him, for a ſhort Time; however, as ſoon as he is upon his Back, he rides away full

---

To aſk whether the "*Criminality or Innocence* "*of the Paper*," be "*Matter of Fact* OR *Matter of* "*Law*;" when it is obviouſly *naither*, but a *Complex Queſtion* of Law AND Fact; is very much the ſame, as if any perſon were to aſk a Chymiſt, whether *Braſs* were made of *Copper* OR *Zink*; whereas it is *not* made entirely of *either*, but is a Compound of BOTH.

† Vol i. p. 508.

Speed,

Speed, and does not return. The Horſe-dealer thereupon ſends after him, takes him, and indicts him for ſtealing the Horſe. This Man, upon his Trial, does not deny his having gone away with the Horſe; but, juſtifies himſelf by ſaying, he had no *Intention* to ſteal him; for, that *he* did *not* run away with the Horſe, but the *Horſe* ran away with him. The *Criminality or Innocence*, therefore, of that Man, depends entirely upon that naked *Matter of Fact*.

There was a remarkable Caſe, of a Man who was tried, ſome Years ago, at Eaſt Grinſtead for a *Burglary* †, before Mr. Juſtice Aſhurſt; Mr. Erſkine was Counſel for

† The Definition of a *Burglar*, as given by Lord Coke, in 3d Inſtitutes, (p. 63, 4th Edit.) and by Blackſtone, in his Commentaries (Vol. iv. Chap. 16. p. 224, 8th Edit.) is, "*He* that, "by *Night*, breaketh and entereth into a Man-"ſion-houſe, *with Intent to commit a Felony.*"

the

the Priſoner. The *Facts* were all admitted, except the felonious *Intent*; for, the Man inſiſted, that his *Intention*, in entering the Houſe, was to *reſcue ſome Goods of his own*. The Jury, not chuſing to decide upon the Matter of *Law*, found all the *Facts* in a *Special Verdict*, and amongſt the reſt, ſtated in their Special Verdict, *as a Fact*, the *Intention* of the Man in entering the Houſe, namely, that it was, "*to reſcue his* "*Goods* †."

The *Intention*, therefore, being Matter of *Fact*, is *not* within the Province of the *Judges*, even according to the Principles of thoſe who oppoſed Mr. Fox's Bill; for, they have not *yet* contended that *Facts* are to be decided by my Lords the Judges.

The forging of a Will, a Bond, a Note of Hand, or a Bill of Exchange, is a capital

† This Fact is ſtated in Mr. Erſkine's Argument in Support of the Rights of Juries, p. 225.

Offence.

Offence. Now, when a Man is indicted for forging a *Bill of Exchange*, for Inſtance, and the *whole* Bill is ſet forth *verbatim* in the Record, it is left to the *Jury* to find, whether the Priſoner be, or be not, *Guilty*; although the Jury, before they can bring in a Verdict of *Guilty*, muſt be convinced not only of the *Fact*, namely, that he forged; but that the *Thing forged* was, in the Eye of the *Law*, a *Bill of Exchange*. So here then, the Jury decide both *Law and Fact*, although the *whole* Bill of Exchange is upon the *Record*. It is therefore, not to be endured, that a *different* Practice ſhould prevail in the Caſe of *Libel*.

The preſent Chief Juſtice of the King's Bench holds, that "*the Province of the Jury* "*is* ONLY *to try* FACTS;" and the *withdrawing* from the Jury the Deciſion of the Queſtion of *Libel* or *no Libel*, is perfectly conſiſtent with that Principle.—But, how will he, upon *his* Principles, maintain his

Conſiſtency in having, in the Caſe of the *King againſt Stockdale*, directed the Jury to *judge* upon the Point "*Whether the Defendant*, "*who was charged with having publiſhed the* "*Pamphlet, did publiſh it* †?" What, in the Eye of the Law, *is* or *is not a Publication*, has often been made a Queſtion; as it was in the famous Caſe of the *Seven Biſhops*, who were tried for preſenting a *Petition to the* King; and as it was alſo, in the Caſe of *Fitton and Car* ††, who were profecuted for a Libel.

---

† See the Trial of John Stockdale for a Libel, taken in Short Hand by Joſeph Gurney, and printed for Stockdale, p. 113.

†† "On Information againſt them for writing, "printing and publiſhing, a Libellous Narrative "and Play called *Pluto furens* of the Lord *Gerrard*; "*Car* was agreed to be Guilty of all the Play; and "the Evidence againſt *Fitton* was only, that two or "three Copies were found in his Chamber, which "*per Curiam* is *no Publication* without diſcourſing "it, or Delivery of it out, and he was acquitted." See Keble's Reports, Part ii. p. 502.

If

If a Man were charged with having *publiſhed* a Libel upon another, by making an Affidavit in a Court of Juſtice, or by preſenting a Petition to the Houſe of Commons, or by writing and ſending a private Letter to a Friend; or were charged with having *publiſhed* a Libel upon a Servant, by having given a Character of him in writing; will the Chief Juſtice pretend to ſay, that it is there *no Queſtion of Law*, whether the Thing written were, or were not, *publiſhed?* Such a Queſtion of Law ariſes, I maintain, *in every poſſible Caſe of Publication*, without exception; although in moſt Caſes, that Queſtion of *Law* is very *eaſily* decided. Why then, did the Chief Juſtice of the King's Bench leave to the Jury, in the Caſe of *Stockdale*, to determine *that* Queſtion of *LAW*, if it be "*the* "*Province of the Jury* ONLY *to try* "FACTS?"

But, even in the Caſe where a Jury *voluntarily part* with the Deciſion of the *Law*

to the Court, they ſtill do it in *ſuch* a Way, as to *reſerve* to themſelves the *Finding of the Verdict*; as clearly appears from the *Form* of a *Special Verdict* †. The Jury, in that Caſe, firſt find the ſeveral *Facts* ſpecially, and then ſay as follows, *videlicet*; "And *if*, upon "the Whole Matter aforeſaid, in Form afore-"ſaid *found*, it ſhall ſeem to the aforeſaid "Juſtices, that" [ſtating the Queſtion of *Law* upon which the Jury doubt] "*then*, "the Jury aforeſaid *find* upon their Oath, "that the ſaid Defendant is *Guilty* of" [ſtating the Crime]: "But, *if*, upon the Whole "Matter aforeſaid, in form aforeſaid found, "it ſhall ſeem to the aforeſaid Juſtices, "that" [ſtating the Queſtion of *Law*, as aforeſaid, upon which the Jury doubt]; "*then*, the Jury aforeſaid *find* upon their "Oath, that the ſaid Defendant is *Not* "*Guilty* of" [ſtating the Crime].

† See Lord Coke's Entries, p. 202. *b*.

So

So that in the Caſe of a *Special Verdict*, the Jury aſk the Judges Aſſiſtance as *Aſſeſſors*, upon thoſe Points of Law *only*, reſpecting which they *doubt*.

Suppoſe, an Indictment to be preferred againſt a Man for *forging* a *Bill of Exchange*, the Whole of which Bill is ſet forth in the Indictment. Now, there are *two* Points of *Law* which ariſe in this Caſe; either, or both, of which may be the Subject Matter, upon which the Jury may pray the Opinion of the Court, in a *Special Verdict*. The Jury may, either *find* the *Forgery*; and pray the Opinion of the Court, whether the Thing ſo forged be, or be not, in *Law*, a *Bill of Exchange*. Or elſe, the Jury may *find* that it *is* a *Bill of Exchange*; and pray the Opinion of the Court, whether, under the Circumſtances of the Caſe, it did, or did not, in *Law*, amount to a *Forgery*.

Therefore, the Jury *leaving* to the Court, *either* Point of *Law* at their own *Option* is a clear

clear and demonſtrative Proof, that *if* the Jury think fit, they have a *Right* to decide upon BOTH.

I will now ſtate an Argument which is deciſive upon the *Right* of Juries, to determine Matter of *Law*, as well as *Facts*. Blackſtone, in his Commentaries †, ſays, that "it is a *ſettled Rule* at Common Law, that "*no Counſel* ſhall be allowed a Priſoner up"on his Trial, upon the General Iſſue, in "any Capital Crime, *unleſs* ſome *Point of* "*Law* ſhall ariſe proper to be debated." And Hawkins ſays the ſame Thing, in his Pleas of the Crown ††. The Law has however been altered by Statute †††, with reſpect to High Treaſon, and Miſpriſion of Treaſon. If the Priſoner be a poor Man, and cannot afford Counſel, ſuch is the hu-

† Vol. iv. Chapter 27, p. 355, 8th Edition.

†† Page 400.

††† Act of 7th and 8th William III. Chap. 3.

mane

mane Spirit of the Law of England, that the Court *muſt aſſign* him Counſel, who will act for him *gratis*, and argue *Points of Law* before the *Jury*. As, for Inſtance, if a Man were indicted for *forging a Bond*, which is a Capital Offence; and if a Queſtion of *Law* were to ariſe at the Trial, whether the *Bond*, the *Whole* of which is in the Indictment, be, in the Eye of the Law, a *Bond*†, or not: in ſuch Caſe, the Counſel for the Priſoner muſt ar-

† The Judges, in their Anſwer to the firſt Queſtion put to them by the Houſe of Lords, ſay, that "the very few *Particularities* which occur in legal Proceedings upon Libel, are *not* "*peculiar* to the Proceedings upon Libel, but do "or may occur in *all* Caſes, where the *Corpus* "*delicti* is ſpecially ſtated *upon the Record*." According to this Rule, ſo expreſſed; the Caſe of *Libel*, and the Caſe of the *Bond* above put, do (at leaſt in *Principle*) agree; inaſmuch, as *both* are, or may be, "*upon the Record*."

gue

gue *that Point of Law* before the *Jury*; but, upon *Matter of Fact*, the Priſoner's Counſel is *not* entitled to be heard. Now, ſince it is (as *Blackſtone* and *Hawkins* ſtate) a *ſettled Rule of Law*, that Counſel, who cannot ſpeak upon the *Facts*, ſhould nevertheleſs be allowed a Defendant, expreſsly for the Purpoſe of arguing the *Points of Law* before the Jury; I appeal to the common Senſe of Mankind, whether *that Rule of Law* is not a demonſtrative Proof, that *Juries have a Right* to decide upon *Law*, as well as *Fact*.

But it is ſaid by ſome Perſons, that the Jury are "*to compound their Verdict of the* "*Fact as it appears in Evidence before them*, "*and of the* LAW *as it is* DECLARED *to* "*them by the* JUDGE;" which is as much as to ſay, that Arguments of Counſel upon *Points of Law*, though *addreſſed* to the Jury, are *not intended* for the Jury, but are only intended for the *Judge* at the Trial, the *Jury* being to take the *Law* from *Him*: as if it were

were poſſible, that the Law ſhould intend, that Counſel ſhould addreſs themſelves to *Twelve* Men, when it is meant that they ſhould be heard only by *One*; and that One, not even one of the twelve! *If* theſe Arguments about *Law*, were only intended for the *Judge*, he would *not ſuffer* the Counſel to addreſs himſelf to the *Jury*; but would do, as Lord Mansfield did, in the Caſe of the *King againſt Horne*, when his Lordſhip *ſtopped* Mr. *Horne*, who was beginning to addreſs the Jury (not upon a *Point of Law*, but) upon a mere *Point of Practice*. For, as ſoon as the Information was opened, Mr. *Horne* addreſſed himſelf to the Court, in the following Words;

" *My Lord*, with your Lordſhip's Permiſ-
" ſion, I believe it is proper for me at this
" Time, before Mr. Attorney proceeds, to
" make an Objection, and to requeſt your
" Lordſhip's Deciſion concerning a *Point of*

" *Practice* in the Proceeding of this Trial. " Have I your Lordſhip's Leave?"

To which Lord Mansfield ſaid, " *Cer-* " *tainly.*" Mr. Horne then addreſſed himſelf to the " *Gentlemen of the Jury.*" Upon which Lord Mansfield interrupted him and ſaid, " *Not* to the *Jury.*—You are to addreſs " yourſelf with reſpect to the *Regularity of* " *the Proceedings*, to *Me* †."

Whereas, on the contrary, when Mr. Attorney General *Thurlow*, and Mr. *Horne* who pleaded his own Cauſe, came to argue the *Point of Law* before the *Jury*; namely, whether the Paper publiſhed was, or was not, a *Libel* (for, the *Publication* was admitted); thoſe Arguments about *Law* were (as they *always* are, in like Caſes) addreſſed to the " *Gentlemen of the Jury*;" and the Judge did *not* call Mr. Attorney General, or Mr.

† See the Trial of John Horne, Eſq. taken *verbatim* by Mr. Blanchard, p. 3.

Horne,

Horne, to order for ſo doing. Neither did Lord Chief Juſtice *Kenyon*, in the Caſe of the *King againſt Stockdale*, nor Mr. Juſtice Buller, in the Caſe of the *King againſt the Dean of St. Aſaph*, interrupt Mr. Erſkine although he argued about Law when he addreſſed the Jury.

In the Caſe of the *King againſt Horne* above-mentioned, Mr. Horne's Defence was, that the Troops *had* been guilty of Murder. Mr. Attorney General *Thurlow* in reply, addreſſing himſelf to the Jury, ſaid, "Gentlemen, The *Matter of the Libel* is this." He then ſtated the Advertiſement, and ſaid, "Let us ſee what is the Nature of the Obſervation he" (Mr. Horne) "makes upon it: in the firſt Place, he ſays, that I left it exceedingly ſhort; and the Objection to my having left it ſhort was ſimply this, that I had ſtated no more to you but this, that the Libel imputed to the Conduct of the King's Troops the Crime of Murder;

" I ſtated it as imputing it to the Troops,
" ordered as they were upon the Public Ser-
" vice, and imputing to that Service the
" Crime and Qualification of Murder, was
" an Expreſſion ſcandalous and ſeditious in
" itſelf, reflecting highly upon thoſe Troops;
" reflecting highly upon the Conduct of
" them; reflecting upon them *to all the Pur-*
" *poſes and Concluſions this Information ſtates;*
" but it ſeems I did not argue it ſufficiently;
" I confeſs very fairly, that to argue ſuch
" Propoſitions as thoſe according to that
" Gentleman's Notions of arguing them ſuf-
" ficiently, is far beyond all the Compaſs,
" all the Talents, and all the Abilities that I
" have in the World; *I cannot ſpeak four*
" *Hours*, in order to *demonſtrate to You*, that
" taxing People with the Crime of Murder,
" and taxing the Conduct of thoſe People
" with that Imputation, is a *ſcandalous Libel*
" upon thoſe meant to be reflected upon. If
" there be a Man, a Profeſſor of Language,
" of

" of better Talents than myſelf, who can " expend four or five Hours upon enlarging " thoſe Matters, I don't envy him, or his " Abilities; if I did, my Lungs would not " even go through it; but I truſt I have ſuf- " ficiently *demonſtrated that Propoſition.*— " Now, upon the other ſide, what is the " Kind of Anſwer that is made to this? To " prove that it *was* Murder, aſſerting that it " *was* Murder over and over again in the " Speech, as a Palliation and Defence of the " *Libel*; but he ſays he is to prove that it " *was* Murder." And again, " I will never, " ſo long as I live, accede to this *as a Propo-* " *ſition of Law*, that a Man ſhall be at Liber- " ty, *in a Libel*, to charge you with the " Crime of Murder, and when indicted for " that *Libel*, or otherwiſe brought into Judg- " ment for it before the Court, he ſhall put " you to prove it *not* Murder; I never heard " of ſuch a Propoſition ever being uſed in " any Place under Heaven; there is not a

" *Maxim*

" *Maxim of Law* to be fetched from any " Country, or of any Age like it."

The Attorney General having thus addreſſed the *Jury* upon the *Point of Law*, is a *direct Admiſſion* on his Part, that *the Jury was competent to decide it*. But it is ſaid, that the *Jury*, in caſe of a Libel, when the whole of it is upon the Record, *has no more to do with the Deciſion of the Law, than the By-ſtanders in the Court-houſe*.—For the Sake of Argument, be it ſo. Suppoſe then, that that Attorney General had addreſſed *this identical Speech about Law*, not to the Jury; but to thoſe, who according to this new-fangled Doctrine, had as much to do with the *Point of Law* as the Jury had; namely, to the *By-ſtanders* in the Court-houſe. What would any body, in *that* Caſe, have thought of this learned Attorney General?—Yet, in what Reſpect would it have been *more* abſurd for him to have addreſſed this Speech about *Law* to the *By-ſtanders*; than to have addreſſed

dreſſed it (as he did) to the *Jury*, who, according to this ſtrange Suppoſition, had *no more Right* to decide upon *Matter of Law*, than the Gentlemen and Ladies who were preſent at the Trial, or than the *Mob in the Street?* Under the abſurd and prepoſterous Suppoſition, that "*the Province of the Jury* "*is only to try* FACTS;" his Conduct was wild and extravagant.

But knowing him to be a Man of a ſtrong Underſtanding, and of the greateſt Ability, I muſt, of courſe, endeavour to reconcile his Conduct, at leaſt with *Common Senſe*; and I muſt therefore ſuppoſe, that he addreſſed the Jury about *Law* in the Caſe of the King againſt Horne, *becauſe he knew* that it was within their Province to decide upon *Matter of Law*, upon the General Iſſue or Plea of *Not Guilty*; as well as to decide upon Matter of Fact. He therefore acted *wiſely* and *judiciouſly* in addreſſing the Jury in the Manner that he did. In anſwer to this, it may poſſibly be ſaid, that

that the then Attorney General acted only as *Counſel*, in the Caſe of the King againſt Horne; and therefore, that it is unfair to urge what a Man ſays as a *Counſel*, as an Argument upon this Subject. But I do *not* ſo urge it (although I do not admit, that an Attorney General proſecuting a Man *ex Officio* ought to be conſidered merely as a *Counſel*); I do not conſider *what* he ſaid when he argued the *Point of Law* before the Jury; nor whether his Poſitions were right or wrong; nor whether his Arguments were good or bad; but the *only* Point I mean to urge is, that in whatever Manner he may have argued the *Point of Law*, his having argued it *at all* before the Jury, is a *clear Proof* that he deemed them *competent* to decide it.

Mr. Attorney General *Pratt* (now Earl Camden), and Mr. Attorney General De Grey (afterwards Lord Chief Juſtice of the Common Pleas), purſued the ſame conſtitutional Line of Conduct, when they reſpectively proſecuted

ſecuted Dr. Shebbeare and Mr. Woodfall; as Mr. Attorney General *Thurlow* did in the Caſe of the *King againſt Horne*.

In ſhort, it is an eſtabliſhed Practice, that the Queſtion of the *Criminality or Innocence* of a Defendant, is argued before the *Jury*; and that, as well in the Caſe of *Libel*, as in *all* other Caſes.

But ſome Perſons have a moſt curious Syſtem upon this Subject. They hold in the firſt Place, that "*the Jury is* ONLY *to try* "FACTS." Therefore Arguments reſpecting *Law* (according to them) are improperly addreſſed *to the Jury*. One ſhould ſuppoſe, that thoſe Perſons therefore think, that thoſe Arguments of Counſel about *Law* are intended for the *Judge who preſides* at the Trial. No, by no Means: for, thoſe *ſame* Perſons are of Opinion alſo, that it is *not* for a ſingle Judge, ſitting at *Niſi Prius*, "*to diſcuſs* "*the Nature of a Libel*," nor to "*comment*" thereupon. The *Judge*, therefore (upon

 thoſe

thoſe Principles), *has no more to do with Law*, whilſt he is ſitting as a ſingle Judge at *Niſi Prius*, than the Jury has. And therefore, thoſe Arguments about *Law* are intended neither for *Judge* nor *Jury!*

Conſequently, all the *learned Arguments* of Counſel at the Trial (according to the extraordinary Opinion of theſe Men) are by the Law, *intended* only to be *waſted in Air*, or elſe are *intended* for the Conſideration and Information of the Judges in *Weſtminſter Hall*, who are *not even preſent* at the Diſcuſſion!

Another ſingular Argument has been uſed upon this Subject; namely, that the Words "*againſt the Peace of the King*," in an Indictment or Information for a *Libel*, are mere Words of Form, like the Words "*moved and ſeduced by the Inſtigation of the Devil.*" And therefore, that a Jury may *convict* a Defendant, although it may *not* appear to them

that

that the Paper publiſhed is " *againſt the* " *Peace.*"

Whereas, Lord Hale in his Hiſtory of the Pleas of the Crown †, ſays, that " An " Indictment, without concluding *againſt the* " *Peace*, is inſufficient." Therefore, the Words *againſt the Peace*," are not *Words of Form*; but are an *eſſential Part* of an Indictment.

On the contrary, the Words " *not having* " *God before his Eyes, but being moved and* " *ſeduced by the Inſtigation of the Devil*," are mere *Words of Form*; and Burn ††, ſpeaking of thoſe Words, ſays, " I do not find " it aſſerted by *any Authority*, that *theſe* " *Words* are *neceſſary* in an Indictment."

---

† Vol. II. p. 188.

†† See Burn's Juſtice, Article Indictment, Vol. II. p. 570, 15th Edit.

Conſequently, a Jury, in conſidering what Verdict they ſhall give, are *not* to attend to theſe mere *Words of Form*; but, they are *bound* to take into their Conſideration thoſe *eſſential* Words, "*againſt the Peace.*"

Judge Blackſtone † lays it down, that, in order for a Paper to be a *Libel*, it muſt tend to "*the Breach of the Peace.*"

The

† In Blackſtone's Commentaries, Vol. III. p. 124, 125, and 126, 8th Edition, it is ſaid, "Mere Scurrility, or opprobrious Words, which "neither in themſelves import, nor are in Fact "attended with any injurious Effects, *will not* "*ſupport an Action.* So Scandals, which concern "Matters merely Spiritual, as to call a Man He-"retic or Adulterer, are cognizable only in the "*Eccleſiaſtical Court*; unleſs any *temporal* Damage "enſues, which may be a Foundation for a *per* "*quod.* Words of Heat and Paſſion, as to call a Man "*Rogue* and *Raſcal*, if productive of no ill Conſe-"quence

The preſent Chief Juſtice of the Common Pleas has maintained, with great Strength of Argument, that *ſpeculative* Writings upon Government are *not Libels.*

The

" quence, and not of any of the dangerous Species,
" before mentioned, *are not actionable:* neither are
" Words ſpoken in a *friendly Manner*, as by Way
" of Advice, Admonition, or Concern, without
" any Tincture or Circumſtance of Ill-will:
" for, in both theſe Caſes, they are not *maliciouſly*
" ſpoken, which is Part of the Definition of *Slan-*
" *der.* Neither are any reflecting Words made
" Uſe of in *legal* Proceedings, and pertinent to the
" Cauſe in Hand, a ſufficient Cauſe of Action for
" Slander. Alſo, if the Defendant be able to
" juſtify, and prove the Words to be *true*, no Ac-
" tion will lie, even though Special Damage hath
" enſued: for *then*, it is *no Slander or falſe Tale.*
" As if I can prove the Tradeſman a Bankrupt,
" the Phyſician a Quack, the Lawyer a Knave,
" and the Divine a Heretic; *this will deſtroy their*

" re-

The Thing that is illegal, is the *exciting* any one to *Sedition*, or to a *Breach of the Peace*. The Queſtion therefore, upon a Libel is, whether the Paper publiſhed *did thus*

" *reſpective Actions.*" And again, " With regard " to *Libels in general*, there are, as in many other " Caſes, *two Remedies*; one by *Indictment*, and ano- " ther by *Action*. The former, for the PUBLIC " Offence; for, every LIBEL has a Tendency to " the BREACH OF THE PEACE, by *provok-* " *ing the Perſon libelled to break* it: *which* Offence is " the *ſame* (in Point of *Law*) whether the Matter " contained be true or falſe; and therefore, the " Defendant, on *an Indictment for publiſhing a Libel*, " is not allowed to alledge the Truth of it by " Way of Juſtification. But, in the Remedy by " *Action, on the Caſe*, which is to repair the *Party* " in Damages for the Injury done him; the De- " fendant may, as for Words *ſpoken*, juſtify the " *Truth of the Facts*, and ſhew that the Plaintiff " has received *no Injury at all*."

excite,

excite, AND was *ſo intended*. Conſequently mere *ſpeculative* Writings on the *Conſtitution* are *not Libels*, however *abſurd* they may be. Suppoſe, for Inſtance, that a Man were to write *a ſpeculative* Work, to prove that a Trial by a ſingle Judge would be far preferable to the Trial by Jury; or that a Parliament, compoſed only of a King and Houſe of Peers, would be beyond Compariſon better than a Legiſlature of King, Lords, and Commons. No Man could poſſibly reprobate ſuch a Work more than I ſhould: but if the Work did *not* excite the People to Sedition, ſuch a *ſpeculative Publication* could certainly never be deemed a *Libel*: for, *Abſurdity* is no Part of the *Definition of a Libel*.

If our *boaſted* Liberty of the Preſs were to conſiſt only in the Liberty to write *in praiſe* of the Conſtitution; *that* is a Liberty enjoyed under many *arbitrary* Governments. I ſuppoſe it would not be deemed quite an *unpardonable* Offence even by the *Empreſs of Ruſſia*,

if

if any Man were to take it into his Head to write a Panegyric upon the *Ruſſian Form of Government*. Such a Liberty as *that* might therefore properly be termed the RUSSIAN LIBERTY OF THE PRESS. But, the *Engliſh Liberty of the Preſs* is of a very different Deſcription: for, by the Law of England, it is *not* prohibited to publiſh *ſpeculative* Works upon the Conſtitution, whether they contain Praiſe or Cenſure.

The *Liberty of the Preſs* is of *ineſtimable* value; for, without it, this Nation might ſoon be as thoroughly *enſlaved* as *France* was, or as *Turkey* is. Every Man who deteſts the *old* Government of *France*, and the *preſent* Government of *Turkey*, muſt be therefore, earneſt to ſecure that *Palladium* of Liberty; and muſt alſo be anxious to preſerve to the People, inviolate, the *Trial by Jury*, that tranſcendent, that incomparable and *guardian* Right.

Various

Various *Reaſons* have been aſſigned, why Mr. Fox's Bill ought *not* to have paſſed into a Law.

1ſt, "Becauſe the Rule laid down by the "Bill, contrary to the unanimous Opi- "nion of the Judges, and the *unva- "ried Practice of Ages*, ſubverts a fun- "damental and important Principle "of Engliſh Juriſprudence; which "leaving *to the Jury the Trial of the "Fact*, reſerves *to the Court the Deci- "ſion of the Law*. It was truly ſaid "by *Lord Hardwicke*, in the Court of "King's Bench, that if ever theſe "come to be confounded, it will prove "*the Confuſion and Deſtruction of the "Law of England*.

2dly, "Becauſe *Juries can in no Caſe* decide "*whether the Matter of a Record be "ſufficient*, upon which to found a "Judgment. *The Bill admits the Cri- "minality of the Writing* ſet forth in

" the Indictment, or Information, *to*
" *be Matter of Law*, whereupon Judg-
" ment may be arreſted, notwithſtand-
" ing the Jury have found the Defend-
" ant Guilty. This ſhews *that the*
" *Queſtion is upon the Record*, and diſ-
" tinctly ſeparated from *the Province*
" *of the Jury, which is* ONLY *to try*
" FACTS.

3dly, " Becauſe *by confining the Rule*, to an
" Indictment or Information for *a Li-*
" *bel*, it is *admitted* that it *does not ap-*
" *ply to the Trial of the General Iſſue*
" *in an Action for the ſame Libel, or*
" *any Sort of Action, or any other Sort of*
" *Indictment or Information*. But as
" the ſame Principle and the ſame
" Rule muſt apply to all General Iſſues,
" or to none, the Rule, as declared
" by the Bill, is manifeſtly errone-
" ous."

Theſe

Theſe Reaſons have certainly not the Demerit of perplexing the Subject by any artful Sophiſtries, nor of rendering it obſcure in Depth of Law. Every one almoſt can perceive their Fallacy. Few Obſervations only need therefore be made upon them.

It is rather ſingular, that amongſt *all* thoſe Reaſons, there ſhould not be *one* that is not founded on a Miſtake.

From the Caſes already cited, it clearly appears, that it has *not* been "*the unvaried "Practice of Ages*," to leave *to the Jury the Trial of the Fact*, and to reſerve *to the Court the Deciſion of the Law.*

It is equally clear, that it is a Miſtake to ſay, that "Juries can *in no Caſe* decide, "whether the *Matter of a Record* be *ſuffici-* "*ent* upon which to found a Judgment." For if, from a Blunder, a Man were to be charged in an Indictment, with having *burglariouſly* broken open an Houſe in the *Day-Time*, and if the Judge at the Trial did *not*

obſerve the Blunder, (for, Houſe-breaking is not *Burglary*, unleſs committed in the *Night-Time*;) will it be ſaid, that the Jury could not acquit the Defendant, on Account of the palpable *Inſufficiency* of ſo abſurd an Indictment?

It is evidently another Miſtake to ſay, that, "The Bill *admits* the *Criminality of* "*the Writing* ſet forth in the Indictment or "Information to be *Matter of Law*;" for, Mr. Fox's Bill contains no ſuch Admiſſion. The *Definition* of a Crime, and alſo the *technical* Manner of *charging* it in an Indictment or Information, are clearly *Matters of Law*; and when, by a Motion *in Arreſt of Judgment*, any ſuch Point of *Law* is brought NAKEDLY before the Court, the Court, no Doubt, has a Right to decide thereon. But the *Criminality or Innocence* of a PERSON accuſed of a Crime (not to uſe the *inaccurate* Expreſſion of the "*Criminality of the Writ-*"*ing*",) is NOT mere *Matter of Law*; but it is, in the very Nature of Things, a *com-*

plex

plex Queſtion of Law and Fact. And although there be, in that COMPLEX QUESTION, a *Point of Law*, which, upon a Motion in Arreſt of Judgment, may come before, and be decided by the *Court*; yet nevertheleſs, at the *Trial*, the *Whole* of that *complex Queſtion of Law and Fact* is before the *Jury*, and muſt, as Lord Chief Juſtice *Vaughan* * properly maintains, be *reſolved* and *determined* by them. For the Law has wiſely provided (as has been already ſaid) *different* GUARDS to prevent an *unjuſt* Judgment from being pronounced againſt any Defendant.

It appears to me, that the Arguments of thoſe who oppoſed Mr. Fox's Bill, have been grounded upon this moſt wretched *Fallacy*; namely, that the *Point of Law* (in Caſes where no Writ of Error is brought) is

---

* See Lord Chief Juſtice Vaughan's Reports, p. 150.

to

to be determined upon *only* ONCE: and that, as it *may* be determined by the *Court* upon a Motion in Arreſt of Judgment, it ought never therefore to be determined by the *Jury!*

As well might they ſay, that *no Court in Weſtminſter Hall* has any Right to decide upon *any Point of Law*, becauſe that very *Point of Law* may afterwards be determined by the *Houſe of Lords!*

I have now been ſpeaking of the Caſe of *Conviction*; for, I have already ſhewn, that the Deciſion of the Jury is (and ought to be) *final* in the Caſe of *Acquittal.*

The next Propoſition, videlicet, "*that the* "*Queſtion is upon the* RECORD, *and diſtinct-*"*ly ſeparated from the Province of the Jury,* "*which is* ONLY *to try* FACTS," contains *two* Miſtakes; as has been ſufficiently proved already.

In the famous Caſe of the *Seven Biſhops*, who were tried for publiſhing a Libel; be-

fore

fore the Jury went out of Court to conſider of their Verdict, they deſired to have the Papers that had been given in Evidence; upon which Lord Chief Juſtice Wright ſaid, "*The Statute Book they ſhall have**." Did the Chief Juſtice order the STATUTE BOOK to be given to the *Jury* in order to *enable* them *to try* FACTS?

It is further ſaid, that "*by confining the* "*Rule* to an Indictment or Information for "a *Libel*, it is ADMITTED that it *does not* "*apply to the Trial of the General Iſſue in an* "*Action for the ſame Libel, or any Sort of* "*Action, or any other Sort of Indictment or* "*Information.*" No ſuch Thing is *admitted* by Mr. Fox's Bill, nor was it ever *admitted* to my Knowledge any where: but directly the *contrary* has been ſtrenuouſly contended. Now, let it be obſerved, that this is not a

* See State Trials, Vol. IV. 3d Edit.

Bill

Bill to *alter* the Law; for if it were ſo, it would be true, that as it only mentions an *Indictment or Information for a Libel*, its Operation would extend no further. But the Bill is a *Declaratory* Bill to *condemn a Species of Direction* which the Legiſlature has deemed to be *illegal*. The Bill, therefore, *reprobates* the very PRINCIPLE upon which that *Species of Direction* is founded; and conſequently the Bill *condemns, as illegal*, that Species of Direction in *all* Caſes.

In the Act † of the 16th Charles I. (Chap. xiv. §. 2.) it is "*declared and enacted*, that "the Charge impoſed upon the Subject, for "the providing and furniſhing of Ships, com-"monly called Ship-money, is contrary to, and

† It is by this Act, that the *extra-judicial Opinion of the Juſtices and Barons*, reſpecting Ship-Money, and the *Judgment* given by the greater Part of the *Judges* againſt *John Hampden*, were declared to be illegal.

"againſt

"againſt the Laws and Statutes of this "Realm." Now it might juſt as well be ſaid, that, as that *Declaratory* Act is *confined* to *Ship-Money*, it is therefore ADMITTED thereby, that it *is legal* for the King to *levy Money* in *all other Caſes* without the Conſent of Parliament!

The oppoſers of Mr. Fox's Bill, in reſpect to *Authorities of Law* ſeem to be ſurrounded with Dearth and Famine: it is no wonder therefore, that the aforeſaid *Reaſons* againſt that Bill, ſhould be attempted to be bolſtered up with what is *ſuppoſed* to have been ſaid by Lord Hardwicke in the Court of King's Bench. The above-mentioned Words which are quoted as Lord Hardwicke's, are reported in the Caſe of the *King againſt Poole*. It is ſaid to have been a Motion for a "New Trial, on an Information in the Na-"ture of a *Quo Warranto* againſt the De-"fendant to ſhew by what Authority he acted

" as Mayor of Liverpool, for that the Ver-
" dict was found on the Matter of Law
" againſt the Direction of the Judge; the
" Judge at laſt ORDERED the Jury to find
" it *ſpecially*, but they brought in a *General*
" Verdict †."

Lord Hardwicke is *reported* to have ſaid †† that, " when the Judge upon a " Doubt of Law, directs the Jury to bring " in the Matter *ſpecially*, and they find a " *General* Verdict, *that* is a *ſufficient Foun-* " *dation* for a new Trial." And alſo †††, that, " *for any Thing that can appear to a Su-*

† See Caſes argued and adjudged in the Court of King's Bench, in the 7th, 8th, 9th and 10th Years of King George the Second, in the Time of Lord Chief Juſtice Hardwicke, from p. 23, to p. 28.

†† Page 26.

††† Page 28.

" *perior*

"perior Court, *the Jury might have found* "*their Verdict* on this; that the Defendant "had not the Majority of Votes." And a new Trial was granted.

This Caſe is reported by an *Anonymous* Writer, and bears every Mark of a *ſpurious* Compoſition; or at leaſt, of an *inaccurate* Report. For, who ever heard of a "*Judge* "ORDERING a Jury" what *Verdict* they ſhould give?

One may apply to *this* Caſe *ſo reported* the Words of *Hamlet*;

"Be thou a Spirit of Health, or *Goblin damn'd*;
"Bring with thee Airs from Heaven, or *Blaſts from Hell*;
"Be thy Intents *wicked* or charitable,
"Thou com'ſt in ſuch a QUESTIONABLE Shape,
"That I will ſpeak to thee."

It cannot be, that Lord Hardwicke, in the Teeth of ſuch Authorities as Littleton, Coke, Hale, Vaughan, Holt, &c. ſhould ever

have laid it down as a *Principle*, that a *Judge* ſhould always have it in his Power *to take from a* JURY their *unqueſtionable Right* of giving a GENERAL *Verdict*, by ORDERING them to find *ſpecially*. It would have been as flagrant a *Violation* of the Laws and Conſtitution, as was committed when the Charter of the *City of London* was *violently* and *illegally* taken away by the Court of King's Bench †, in the Reign of King Charles the Second; and as to the *Conſequences* to the Public, they would be infinitely worſe. And it would have been the more violent, as it is ſtated in the Report, that "*for any Thing* "*that appeared to the Court the Jury might* "*have found their Verdict*" on a Matter of

† By the Act of the 2d of William and Mary, Seſſion 1ſt, Chap. viii. § 2, that Judgment of the Court of King's Bench, is declared to be *illegal and arbitrary*, and is *declared and enacted* to be reverſed, annulled, and made void.

FACT;

FACT; namely, "*that the Defendant had* "*not the Majority of Votes.*" And nothing is reported to have appeared to the Court, that the *Jury* were *miſtaken* as to the *Fact*. And therefore, although the Jury *might* have found their *Verdict* upon a FACT; and, for any Thing that *appeared* to the *Court*, might have been *perfectly* RIGHT in ſo finding; yet, the *Verdict* was ſet aſide, becauſe they did not obey the ORDER of the *Judge*, which was to find *ſpecially*.

It is therefore, much more natural to ſuppoſe, that *this Caſe* is *inaccurately* reported by the *anonymous* Reporter, than to ſuppoſe that Lord Hardwicke and the Court of King's Bench *did* act in a Manner ſo *violent* and *unconſtitutional*. Yet, ſuch is the Caſe which is relied on by the Oppoſers of Mr. Fox's ſalutary Bill; and for want of better Authority, it has been quoted *over and over* again by them!

When *ſuch Principles* as thoſe above ſtated, reſpect-

reſpecting *Juries*, *Libels*, and GENERAL VERDICTS, are not only treated with Reſpect, but are held forth as Objects of Veneration; it is indeed high Time for Members of the Legiſlature to be *vigilant*, and for the *People* themſelves to be UPON THE WATCH.

One cannot ſee ſuch a Caſe as that above mentioned, attempted to be ſet up in this country as an Authority of Law, without admiring the Advice of a celebrated Writer †, in his Dedication to the *Engliſh Nation*; "Let me exhort and conjure "you," (ſays he) "*never* to ſuffer an *Invaſion* "of your political Conſtitution, to paſs by, "without a *determined, perſevering Reſiſtance*. "One Precedent creates another.—They ſoon "accumulate, and conſtitute Law. What "Yeſterday was Fact, To-day is Doctrine. "Examples are ſuppoſed to juſtify the moſt "*dangerous* Meaſures; and where they do not

† Junius.

"ſuit

" ſuit exactly, the Defect is ſupplied by Ana-
" logy.—Be aſſured, that the Laws, which
" protect us in our civil Rights, grow out
" of the Conſtitution, and that they muſt
" fall or flouriſh with it. This is not the
" Cauſe of Faction, or of Party, or of any
" Individual, but the *common Intereſt* of every
" Man in Britain."

I know I ſhall be aſked, why I am ſo exceedingly *anxious* upon this Subject. It will be ſaid, *Are our preſent Judges not learned, are they not honeſt, and reſpectable; what then have we to fear?* It is with great Satisfaction that I admit, that our *preſent* Judges are of that Deſcription. But let us recollect the *Reaſon* why they are ſo. So long as the Judges are confined by Law (to uſe the Expreſſion of a learned and venerable Earl†) to the giving " *their Advice to Ju-*
" *ries both as to Law and Fact*," ſo long will the Judges be reſpectable. But if ever that

† Earl Camden.

ſacred

ſacred Principle of the Law of England ſhould be ſubverted, and if the Time ſhould ever come, when the Power of *Juries* ſhall be deſtroyed, and when the Characters, the Lives, the Liberties, and Properties of the People ſhall be at the *Diſpoſal of Judges* appointed by the Crown; from that Moment it becomes the Intereſt of any *corrupt* Miniſter who hereafter may ariſe, to appoint for Judges, his moſt violent Partizans, and thoſe who would go the greateſt Lengths to ſupport his flagitious Government. We might then have again placed upon the Bench, ſuch Men as *Judge Jefferies* himſelf; if, in the preſent Age, *ſuch* Men could poſſibly be found.

It has been truly ſaid by a learned Author†, that "Trials by Juries have been uſed in "this Nation Time out of Mind, and were

† *Trial per Païs*, Page 3, by Giles Duncomb of the Inner Temple.

"con-

" contemporary and coeval with the firſt ci-
" vil Government thereof, and Adminiſtration
" of Juſtice; for, amongſt the firſt Inhabit-
" ants the *Britons*, the Freeholders were uſed
" in all Trials. And Trial by Jury was
" practiſed by the *Saxons*, continued by the
" *Normans*, and confirmed by *Magna Charta*;
" and was ever ſo eſteemed and prized in this
" Iſland, that no Conqueſt, no Change of
" Government ever prevailed to alter it."

Far otherwiſe has it been, with reſpect to every *other* Part of our Conſtitution. Corruption has, in former Times, pervaded the *Houſe of Commons*; and the undue Influence of the Crown, in thoſe Times, has even crept into the *Houſe of Lords*. Previouſly to the happy Æra of the Revolution in the laſt Century, we have had Tyrants upon the *Throne*; ſuch as the bloody Richard the Third, the cruel Henry the Eighth, the three firſt Kings of the Stuart Family, and that

Engliſh Tarquin King James the Second. We have had in our *Courts of Juſtice*, ſuch execrable Men as the Ship-money Judges of King Charles, and the diſpenſing Judges of King James. We have even had upon the Bench ſuch Monſters as *Scroggs* and *Jefferies*, whoſe very Names no honeſt Man can hear without Horror and Indignation. Our *Habeas Corpus*, that ſecond *Magna Charta*, has ſometimes been ſuſpended by Act of Parliament. The People have been *diſarmed* by an undue Stretch of the Prerogative, which flagrant Violation of the Conſtitution was afterwards pointedly reprobated in the Declaration and Bill of Rights. Even the very Eſſence of Freedom in this Country has been attempted to be deſtroyed, by that moſt violent and alarming of all Meaſures, the licenſing Act of King Charles the Second, which totally deſtroyed, for a Time, the *Liberty of the Preſs*. In ſhort, at ſome Period or other of our Hiſtory, every

every Thing valuable, every Thing important, in our Form of Government, has been either annihilated or rendered uſeleſs; and every Rampart againſt Tyranny, every Defence of our Rights, and all the Out-works of the Conſtitution, have ſuffered a temporary Overthrow, by the violent Efforts, or artful Deſigns, of the Enemies of public Freedom.

One *Citadel* however, has withſtood the Siege. One important Fort has alone ſucceſsfully reſiſted the Attacks that have been made upon it: it has reſiſted for ages: it has neither been deſtroyed by Sap, nor taken by Storm.— If therefore, we are ſtill a *free* Nation; if this Kingdom is the richeſt, and the moſt proſperous Country that at this Moment exiſts in Europe; we owe it to that ſtrong Hold, and *Fortreſs of the People*, to that impregnable GIBRALTAR of the Engliſh Conſtitution, the TRIAL BY JURY. *This* is that invaluable *Bulwark of Liberty*, which Parliament has

has lately protected, and will I truſt ever continue to protect: at leaſt I ſhall conſider it as one of my moſt eſſential Duties, to defend it ſteadily to the laſt Hour of my Life.

FINIS.